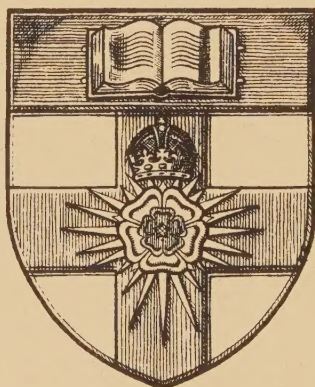


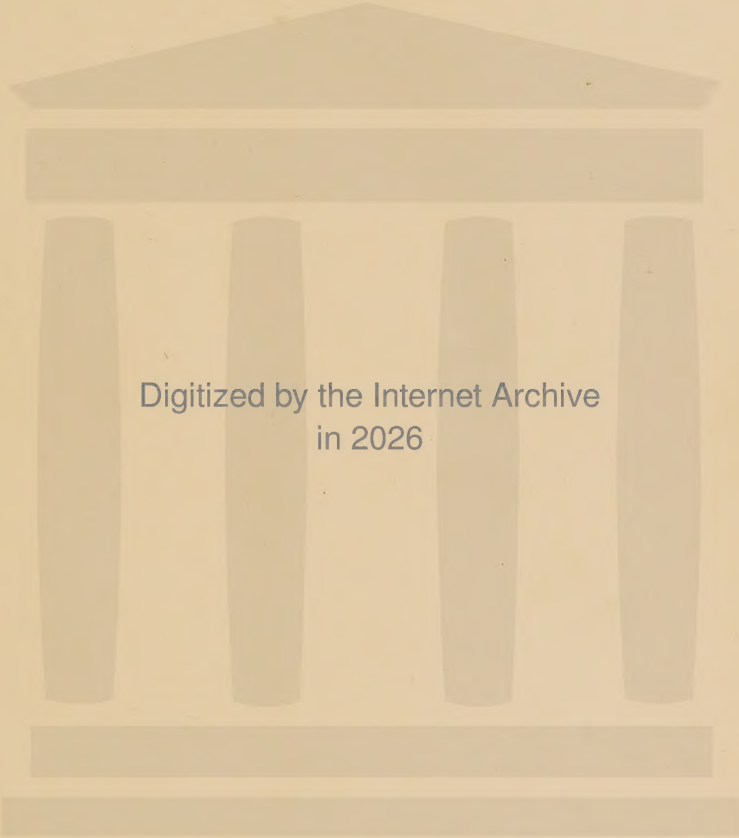
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Appeal Cases
 BEFORE
THE HOUSE OF LORDS
 (ENGLISH—IRISH—AND SCOTTISH)
 AND
THE JUDICIAL COMMITTEE
 OF
 HER MAJESTY'S MOST HONOURABLE
PRIVY COUNCIL

J. LUCIEN DANSEREAU	APPELLANT;	J. C.*
AND		
COLETTE BERGET AND ANOTHER	RESPONDENTS.	1953 Oct. 5.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Supreme Court—Jurisdiction—Will—Grant of probate—Not conclusive even between contesting parties—Judgment of provincial appellate court not “final”—No jurisdiction in Supreme Court of Canada to entertain appeal—Supreme Court Act, R.S.C. 1927, c. 35, ss. 2 (b); 36 (a).

By section 2 of the Supreme Court Act (R.S.C. 1927, c. 35):
 “(b) ‘Final judgment’ means any judgment . . . which determines
 “ . . . any substantive right of any of the parties in controversy in
 “ any judicial proceeding”; and by section 36, “ . . . an appeal
 “ shall lie to the Supreme Court from any judgment of the highest
 “ court of final resort . . . in any province of Canada pronounced in
 “ a judicial proceeding . . . where such judgment is, (a) a final
 “ judgment; . . .”

According to the law of the Province of Quebec the grant of probate of a will is not, as it is in England, conclusive, and does not

* *Present:* LORD NORMAND, LORD OAKSEY, LORD TUCKER, LORD ASQUITH OF BISHOPSTONE and LORD COHEN.

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create *res judicata* even between parties who have contested its validity, and the probate can be cancelled on proof of a later will.

Where, therefore, the Court of King's Bench of Quebec had reversed a judgment of the Superior Court of Quebec, which latter court had upheld the probate of the earlier of two wills of a testator, the judgment of the Court of King's Bench, which had granted probate of the later will, was not a "final" judgment within the meaning of section 2 of the Supreme Court Act since the grant of probate was not conclusive and could be contested in appropriate proceedings, and did not determine a substantive right in a judicial proceeding within the meaning of that section. Accordingly, the judgment of the Court of King's Bench not being "final," the Supreme Court of Canada, by virtue of section 36 of the Act, had no jurisdiction to entertain an appeal from it, and the judgment of the Supreme Court, which purported to affirm that of the Court of King's Bench, having been made without jurisdiction, the order of the Supreme Court should be varied so as to confine it to an order dismissing the appeal for want of jurisdiction and omitting that part of the order which affirmed the probate of the later will.

Migneault v. Malo (1872) L.R. 4 P.C. 123 applied.

CONSOLIDATED APPEALS (No. 35 of 1952), by special leave, from a judgment of the Supreme Court of Canada (October 22, 1951) dismissing an appeal from a judgment of the Court of King's Bench of Quebec (April 28, 1950) which had set aside a judgment of the Superior Court of Quebec (March 5, 1948).

The testator, Eugène Berthiaume, a publisher and journalist of Montreal, died on August 31, 1946. He was the son of the late Trefflé Berthiaume, and the present appellant, J. Lucien Dansereau, was one of the latter's trustees and had been an intimate friend throughout his life of Eugène Berthiaume. The first respondent, Colette Berget, who was born in France, was Eugène Berthiaume's niece by his second marriage, and had lived with him for about 12 years before his death. The second respondent, Fanny Irenée Gabrielle Colin, was Eugène Berthiaume's third wife.

On March 14, 1935, Eugène Berthiaume made a holograph will leaving all his property to the appellant. On July 2, 1937, Berthiaume married the second respondent, and on November 1, 1937, he made a holograph will leaving all his property to her. On September 28, 1943, he made a will in notarial form revoking his previous wills and leaving all his property to the second respondent. On April 6, 1946, by a deed passed before the notary by whom the last-mentioned will was drawn, Berthiaume revoked the will of September 28, 1943. On the 5th of an unnamed month in 1946, Berthiaume prepared a will in English form leaving all his property to the first respondent. He signed that

document, but it was not witnessed, and was therefore not a will. After his death that document was found among his papers, still unattested.

On August 21, 1946, Berthiaume wrote a letter to the first respondent in which he mentioned that unattested document. That letter stated, *inter alia*: "Je me suis senti très fatigué " dernièrement et n'ai pas eu le temps de m'occuper de ton " testament. De toutes façons j'aimerais à te dire que s'il " m'arrivait quelque chose tout ce qui m'appartient est à toi."

On September 4, 1946, on the appellant's application, the Superior Court of Quebec admitted the will of March 14, 1935, to probate. On September 23, 1946, the first respondent presented a petition to the Superior Court asking that the letter of August 21, 1946, be admitted to probate and that the judgment of the Superior Court of September 4 be set aside.

The petition came before Cousineau J., who dismissed it and upheld the probate of the will of March 14, 1935. The first respondent appealed to the Court of King's Bench (Appeal Side) (Galipeault C.J., St. Jacques, McDougall, Pratte and Bertrand JJ.), and that court allowed the appeal, admitted the letter of August 21, 1946, to probate, and set aside the judgment of September 4, 1946. The appellant then appealed to the Supreme Court of Canada; the majority of that court (Taschereau, Cartwright and Fauteux JJ.) dismissed the appeal on the merits, and the minority (Rand and Estey JJ.) were of opinion that the appeal should be quashed on the ground that the court was without jurisdiction.

One of the main issues in this appeal was whether the judgment of the Court of King's Bench of Quebec of April 28, 1950, was, in a probate matter, a "final" judgment within the meaning of sections 2 and 36 of the Supreme Court Act, R.S.C. 1927, c. 35, so as to give the Supreme Court jurisdiction to entertain an appeal therefrom.

The interest of the second respondent (who was the appellant in the second of the two consolidated appeals) was that she might either inherit the whole of her husband's estate by the holograph will of November 1, 1937, if it were deemed not to have been revoked, or inherit one-half of his estate under the relevant provisions of the Quebec Civil Code if it were decided that he died intestate.

1953. July 8, 9, 13 and 14. *Edouard Masson Q.C.* (Canadian Bar) for the appellant. There are two questions of law: first, as

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to jurisdiction, which the appellant has raised from the beginning of the proceedings and in every court below; secondly, whether the letter of August 21, 1946, is a will or not. Under the law of Quebec a petition for probate is a non-contentious proceeding and does not confer jurisdiction to determine judicially substantive rights. The rights which the first respondent is claiming by her petition are contentious and substantive and under article 857 of the Civil Code of Quebec the Supreme Court, the Court of King's Bench and the Superior Court had no jurisdiction to adjudicate such rights on a petition for probate. Since the probate of a will gives effect to it until it is set aside upon contestation, it is further submitted that the court had no jurisdiction to admit to probate a will which was incompatible or inconsistent with a will from the same testator already probated. In such a case the recourse is by way of an ordinary contentious action which must begin with a writ of summons. Article 44 of the Code of Civil Procedure provides that "An appeal also lies to the Court of King's Bench, sitting in appeal—(1) From any judgment rendered or order given by a judge in any non-contentious proceeding under the provisions of the 10th part of this code" (which relates to probate matters). Without article 44, the Court of King's Bench was without jurisdiction to hear the appeal of the first respondent from the decision of the Superior Court. That article restricted the jurisdiction of the court to a judgment in probate only; the court could not determine any contentious matters involving substantive rights. It is because the Court of King's Bench went outside of the scope of a petition for probate that its judgment is *ultra vires*.

In Quebec law a judgment rendered without jurisdiction creates *res judicata*. The Supreme Court had no jurisdiction to confirm the judgment of the Court of King's Bench, but it had jurisdiction to declare that the judgment of that court was *ultra vires*. [Reference was made to Fuzier-Herman & Darras, *Code Civil Annote* (1896 ed.), vol. 3, under article 1351 of the Code Napoleon, para. 226, and vol. 2, para. 183; to Sirey, *Codes Annotes—Code Civil*, vol. 3 (5th ed., 1913), p. 179; and to Dalloz, "*Recueil*" (1950), p. 1, "*Sommaire*."] The above authorities would be accepted by the Quebec courts because the relevant articles of the Quebec Civil Code are similar to those of the Code Napoleon.

There was no jurisdiction in the Supreme Court to hear the appeal because, being in respect of a probate matter, the judgment of the Court of King's Bench was not a "final" adjudication on

substantive rights within the meaning of section 2 of the Supreme Court Act (c. 35 of R.S.C. 1927); *Migneault v. Malo*¹; but a Court of Appeal has always jurisdiction to declare that a judgment of an inferior court is ultra vires. On the question of jurisdiction, the judgment of Rand and Estey JJ. in the Supreme Court was right, and the judgment of the Superior Court ought not to have been reviewed on appeal. An action should have been brought and all the persons interested brought in; that would have been the easiest way to dispose of all the litigation between the parties.

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J. P. Charbonneau Q.C. (Canadian Bar) for the second respondent. If the court exceeds its jurisdiction the decision will stand until it is reversed. The judgment of the Court of King's Bench sitting in appeal adjudicated upon substantive rights as if in contentious proceedings, was ultra vires but, nevertheless, created res judicata and was a final judgment. That judgment being a final judgment, rendered without jurisdiction, the Supreme Court had full jurisdiction to reverse it and should have reversed it, but no more than the Court of King's Bench did the Supreme Court have the power to affirm and, in its turn, to decide upon substantive rights. The authorities are to the effect that if in proceedings which would otherwise be non-contentious some substantive questions of fact are raised, contestation is brought between the parties and adjudicated upon, and then the judgment must be treated as a contentious matter creating res judicata. If this respondent is deprived of the benefit of article 858 of the Civil Code, which provides that "the probate of wills does not prevent "their contestation by persons interested," she would be deprived of taking any action in her favour.

Andre Forget Q.C. (Canadian Bar) and *R. O. Wilberforce* for the first respondent. Once the nature and effect of probate in Quebec are understood, the question of jurisdiction is solved very simply. Probate has two effects: (i) it is a means whereby the original of a holograph will is deposited in the archives of the court so that the officer of the court may issue authentic copies; (ii) the probate gives effect to the will; it creates almost a presumption of validity once the will has been probated. A judgment in probate does not possess in Quebec the force of res judicata even when intra vires so far as the parties to the probate are concerned: *Migneault v. Malo*,¹ which has been followed consistently since it was decided in 1872. Even if this Board ordered probate of the will to be granted, that judgment would not be res judicata

¹ (1872) L.R. 4 P.C. 123.

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in respect of the parties. Applying those considerations to this case, and considering first the jurisdiction of the Superior Court and the Court of King's Bench, under article 857 of the Civil Code the first respondent must proceed for probate. There is no other way than by petition; she is therefore in the right court and there on the right procedure. It was said for the appellant that non-contentious proceedings were not available to the first respondent because there was in existence probate of another will. Any appropriate proceeding in which the will or the probate can be attacked is a "contestation"; and it is submitted that in non-contentious proceedings, such as a petition for probate, contentious matters can be brought in: Civil Code, articles 860, 861. Further, non-contentious proceedings can be, and are quite frequently, contentious in reality. A judgment in a non-contentious proceeding is just as final as one in contentious proceedings and just as *res judicata*, subject to the exception in article 858. The only difference between so-called non-contentious proceedings and contentious proceedings is that one starts with a petition and the other with an action, otherwise the two sets of proceedings are identical.

There is an appeal to the Supreme Court from any final judgment: section 2 of the Supreme Court Act. There was jurisdiction in the Supreme Court and in the Court of King's Bench to hear issues in respect of the will: article 858, Civil Code. It is perfectly proper for a petition for probate to request that a probate of a prior will should be set aside, but if the appellant be right that no part of the petition should have been put forward by petition, but only by action, then the trial judge should have dismissed the petition. If the Supreme Court had no jurisdiction to hear the appeal regardless of what the issues were in law, it must dismiss it. The appellant has raised the question not only of the jurisdiction of the Supreme Court, but also of both courts below. Appeals direct to this Board from the Court of King's Bench, Quebec, have been abolished. It really does not matter for the purposes of the first respondent's case whether the Supreme Court had jurisdiction or not—whether it dismissed the appeal for lack of jurisdiction or on the merits is indifferent to her. [Reference was made to *Migneault v. Malo*¹ and to *Mignault*, *Droit Civil Canadien*, vol. 4, p. 314.]

Summarizing: the petition is one for probate to the proper court; even provisional effect cannot be given to contrary wills,

¹ (1872) L.R. 4 P.C. 123.

and thus mislead the debtors and creditors; the petition constituted a proper contestation of the will in favour of the appellant under articles 1430 of the Code of Civil Procedure and 857 of the Civil Code; the petition is in the nature of a revision under article 1310 (Civil Procedure Code) of the judgment granting probate of the first will; the first respondent was before the proper court on all parts of her petition, and on the right proceeding, and the Court of King's Bench had a right to entertain the appeal; even if her proceedings were wrong the appellant suffered no prejudice because there is not *res judicata*. On the question of the jurisdiction of the Supreme Court there are grave doubts, but the argument is in favour of jurisdiction in saying that the judgment of the Court of King's Bench is final in a sense that it is *res judicata*; it determines finally which of these two wills had provisional effect. If that is wrong, and the Supreme Court had no jurisdiction, it makes no difference to this respondent, because the judgment of the Supreme Court was right whether it had jurisdiction or not. If the Board come to the conclusion that the Supreme Court had no jurisdiction, the Board can only dismiss the appeal to it from the Supreme Court.

Masson Q.C. in reply. The judgment of the Court of King's Bench was not a "final" judgment within the meaning of section 2 of the Supreme Court Act. [*Bourdeau v. Phoenix et Jolicoeur*² and articles 175 and 176 of the Civil Procedure Code were referred to.] If the wrong proceedings were taken (by petition instead of action) the appellant did suffer prejudice. The judgment of the majority of the Supreme Court is a final judgment; there is no doubt of that, because it confirms the judgment of the Court of King's Bench which, though rendered without jurisdiction, created *res judicata*. If, therefore, the judgment of the Supreme Court is final, this Board has jurisdiction to hear an appeal from that judgment. A Court of Appeal has jurisdiction to reverse a judgment which has been rendered without jurisdiction and is *ultra vires*: *Dostaler v. Lalonde*.³ This Board has the power to render the judgment which the Court of King's Bench should have entered. There has been a miscarriage of justice so far as the appellant is concerned. [Reference was also made to *Charette v. Rosseau*.⁴]

Charbonneau Q.C., in reply, referred to *Bourdeau v. Phoenix et Jolicoeur*⁵ and *Dugas v. Amiot*.⁶ All the jurisprudence and

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² (1922) 61 Sup.C.R. (Quebec) 418.³ (1919) 29 K.B. (Quebec) 195,
198-9.⁴ (1908) 9 Que.P.R. 395.⁵ 61 Sup.C.R. (Quebec) 418.⁶ [1929] S.C.R. (Can.) 600, 613.

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authors are in agreement in saying that even in matters which would be non-contentious, if the judgment rendered decided on contestations brought on by the parties there would be *res judicata* on the question which was adjudicated upon, and they are also in agreement to the effect that a judgment even if *ultra vires* will have the status of *res judicata* until it is reversed by a higher tribunal. There appears to be no decision to the contrary. So the judgments given by the Superior Court, by the Court of King's Bench and by the Supreme Court of Canada have acquired the status of *res judicata*, and are therefore all final.

[LORD NORMAND (after consultation). In view of the opinion which we have formed on the question of jurisdiction it will be unnecessary to hear further argument in this case.]

October 5. The judgment of their Lordships was delivered by LORD OAKSEY. This is an appeal, by special leave, from a judgment of the Supreme Court of Canada dismissing an appeal from a judgment of the Court of King's Bench of Quebec which had set aside a judgment, dated March 5, 1948, of the Superior Court of Quebec.

No petition for special leave to appeal from the Court of King's Bench of Quebec was presented.

The primary question, therefore, which arises for their Lordships' consideration is whether the judgment of the Court of King's Bench was a final judgment within the meaning of the Supreme Court Act (Revised Statutes of Canada 1927, c. 35, sections 2 and 36) and therefore appealable to the Supreme Court. The material sections of the Supreme Court Act are as follows:

"2. In this Act, unless the context otherwise requires, . . .
 "(b) 'Final judgment' means any judgment, rule, order or
 "decision which determines in whole or in part any substantive
 "right of any of the parties in controversy in any judicial
 "proceeding; . . . (e) 'Judicial proceeding' means and includes
 "any action, suit, cause, matter or other proceeding in disposing
 "of which the court appealed from has not exercised merely a
 "regulative, administrative, or executive jurisdiction; . . ."

"36. Subject to sections 38 and 39 hereof, an appeal shall
 "lie to the Supreme Court from any judgment of the highest
 "court of final resort now or hereafter established in any province
 "of Canada pronounced in a judicial proceeding, whether such
 "court is a court of appeal or of original jurisdiction . . . where
 "such judgment is, (a) a final judgment;".

Upon this question the Supreme Court does not appear to have come to a definite conclusion, though Rand and Estey JJ. were of opinion that the court had not jurisdiction.

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The judgments of the Court of King's Bench and of the Superior Court of Quebec were delivered on a petition by the respondent Berget praying that a document dated August 21, 1946, be admitted to probate as the last will and testament of the late Eugène Berthiaume, who died on August 31, 1946, and that the probate of a will of the same testator dated March 14, 1935, granted by a judgment of the Superior Court of Quebec on September 4, 1946, in favour of the appellant Dansereau be annulled and set aside. Cousineau J. in the Superior Court dismissed this petition and upheld the probate of the will of March 14, 1935. The Court of King's Bench reversed this decision and granted probate of the will of August 21, 1946.

It has been contended on behalf of the appellants Dansereau and Colin that the petition was incompetent in that it combined in one petition a prayer for the probate of the will of August 21, 1946, with a prayer for the cancellation of the probate of the will of March 14, 1935, already granted on September 4, 1946, and that probate of a will once granted can only be contested by an action and not by petition.

It was admitted in the present case that the will of March 14, 1935, could have been contested in an action, but it was argued that it could not be contested in a petition. It is, however, to be observed that on the granting of probate of a later will, namely, the will of August 21, 1946, as the last will and testament of the deceased, it necessarily followed that the earlier will was not the last will of the deceased.

Their Lordships do not find it necessary to decide the complicated questions of procedure which have been argued before them as to whether an action or a petition is the more appropriate form of procedure. They think it clear on the authority of *Migneault v. Malo*¹ that according to the law of the Province of Quebec the grant of probate is not, as in England, conclusive even between parties who have contested the grant, and they think, therefore, that probate can be cancelled on proof of a later will. It is true that in *Migneault v. Malo*¹ their Lordships were not dealing with a case in which two wills had been produced, but their Lordships said²: "At first sight it certainly appeared to their Lordships that this language [viz., the

¹ L.R. 4 P.C. 123.² Ibid. 136.

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“ language of a Quebec Statute 41 Geo. 3, c. 4, s. 2] availed to
“ introduce the law of England with respect to the conclusiveness
“ of a probate duly granted into the law of Canada; and that
“ where, as in the present case, a suit as to the validity of the
“ will had been contested in open court, both parties appearing,
“ pleading, and one examining, the other cross-examining,
“ witnesses, and probate had then been granted, the same
“ question could not be raised again, at all events between the
“ same parties, before another tribunal; but that the production
“ of the probate would operate as an estoppel to any such action.
“ This, moreover, appears to their Lordships to be the true
“ construction of the words, ‘ such proof shall have the same
“ ‘ force and effect as if made and taken before a Court of
“ ‘ Probate.’

“ Their Lordships, however, think that they cannot consider
“ this matter now as *res integra*. They cannot disregard the
“ practice of the Canadian courts with respect to it for the last
“ 70 years, and they have, therefore, made as careful an
“ investigation into this practice as the circumstances permit.

“ It appears, in the first place, that no appeal has ever been
“ instituted from a decree or grant of probate made by the court
“ —that it is very doubtful, whether any allegation or plea as
“ to the merits, for instance, a plea or allegation setting up
“ insanity or undue influence, could be propounded, or would be
“ admitted on an application for probate. . . .

“ Upon the whole, it appears to their Lordships that, by the
“ uninterrupted practice and usage of the Canadian courts of
“ justice since 1801, the law has received an interpretation which
“ does not affix to the grant of probate, even in the circumstances
“ of this case, that binding and conclusive character which it has
“ in England, and that according to that interpretation it was
“ competent to the respondent to impugn the validity of this will
“ by way of defence to the action brought by the appellant for
“ the payment of the annuity.”³

It appears, therefore, that in that case although the validity of the will in question had been contested in open court, both parties appearing and probate having then been granted, the validity of the probated will was allowed to be contested again by the same party who had appeared and contested its validity before. In their Lordships’ opinion this was a decision that probate of a will is not conclusive and does not create *res judicata*

³ L.R. 4 P.C. 123, 139.

even between parties who have contested its validity, and it is a decision which has been followed ever since.

In these circumstances their Lordships are of opinion that the judgment of the Court of King's Bench was not a final judgment within the meaning of the Supreme Court Act since the grant of probate is not conclusive and can be contested in appropriate proceedings, and if that is so it cannot in their Lordships' view be said that a grant of probate determines a substantive right in a judicial proceeding within the meaning of the Supreme Court Act. Their Lordships therefore agree with Rand and Estey JJ. that the Supreme Court of Canada had no jurisdiction to entertain the appeal.

Their Lordships will humbly advise Her Majesty that the judgment of the Supreme Court of Canada having been made without jurisdiction the order of that court should be varied so as to confine it to an order dismissing the appeal for want of jurisdiction and omitting that part of the order which affirms the probate of the will of August 21, 1946. In view of the course which the proceedings have taken in the courts below their Lordships think that each party should bear his or her own costs both in the Supreme Court of Canada and before their Lordships' Board.

Solicitors: *Blake & Redden; Charles Russell & Co.; Lawrence Jones & Co.*

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[HOUSE OF LORDS.]

DALE AND OTHERS APPELLANTS; H. L. (E.)*

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS. 1953
June 11, 17,
24, 25, 27;
July 20.

Revenue—Special contribution—Investment income—Annuity payable to trustee included in assessment—"Annual payment"—"Earned income"—Whether trusteeship an office of profit—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 14 (3), Sch. D, Case III, r. 1 (a), All Schedules Rules, r. 19—Finance Act, 1920 (10 & 11 Geo. 5, c. 18), s. 33—Finance Act, 1948 (11 & 12 Geo. 6, c. 49), ss. 47, 49, 68 (2).

* *Present*: LORD NORMAND, LORD OAKSEY, LORD MORTON OF HENRYTON, LORD REID and LORD COHEN.

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By section 49 (1) of the Finance Act, 1948, for the purpose of special contribution under that Act, "investment income" means income "from any source other than a source of earned income." For the purposes of that Act "earned income" has the same meaning as in the Income Tax Acts, viz., income which is earned income within the meaning of section 14 (3) of the Income Tax Act, 1918.

A testator by his will established a charitable trust and directed that the trustees of the trust should each receive £1,000 a year free of tax so long as they performed the duties of trustees. The trusteeship involved onerous and regular duties. One of the trustees was assessed to "special contribution" under section 47 of the Act of 1948, the assessment including as part of his "investment income" the remuneration which he was paid as a trustee under the trust. He contended that it was "earned income":—

Held, that the remuneration in question was "earned income" and not "investment income," and accordingly was not subject to special contribution.

Income which was the conditional gift of the testator might nevertheless also be earned by compliance with the testator's condition of serving as a trustee and the receipt of a profit for the performance of the duties of a trustee was not necessarily repugnant to the nature of trusteeship.

Decision of the Court of Appeal [1952] Ch. 704; [1952] 1 T.L.R. 1566; [1952] 2 All E.R. 89 reversed.

APPEAL from the Court of Appeal (Evershed M.R., Birkett and Romer L.JJ.).

This was an appeal from an order of the Court of Appeal dated May 21, 1952, allowing an appeal by the respondents, the Commissioners of Inland Revenue, from an order of the Chancery Division of the High Court (Harman J.) dated July 4, 1951, whereby an appeal by the appellants, Sir Henry Dale and the trustees of the will of Sir Henry Wellcome, on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts, was allowed and the decision of those Commissioners was reversed. The appeal related to the special contribution imposed by Part V of the Finance Act, 1948, in respect of investment income.

The facts, stated by Lord Normand, were as follows: The testator appointed five persons, including Sir Henry Dale, to be his executors and trustees, and directed that each trustee was to receive the sum of £1,000 per annum free of tax so long as he should continue to act as trustee. He expressed a desire that so far as possible at all times two of his trustees should be men experienced and well qualified in medicine and allied sciences, and that two should be men of wide practical business

experience, one or both being of high standing and ability in the practice of law and with exceptional experience and qualifications in the conduct and administration of large and important estates. The special duties of the trustees included the exercise of wide powers in relation to the control of the Wellcome Foundation Ltd., the administration of the research fund established by the will and the application of moneys to and among the various research objects indicated by the will, and the administration of the research museum and library fund which were also established by the will. The testator left a written memorandum which set out his policy and aims for the guidance of his trustees. The trustees held frequent meetings, which were necessary for the performance of their duties, and Sir Henry Dale, who was at one time President of the Royal Society and Chairman of the Scientific Advisory Committee to the War Cabinet, habitually spent about two hours a day dealing with the affairs of the trust.

Sir Henry Dale's assessment to special contribution under the provisions of Part V of the Finance Act, 1948, included, as part of his aggregate investment income, the sum of £1,446, which represented the sum (together with the appropriate additions thereto in respect of income tax and surtax) received by him in the financial year 1947-48 by virtue of the provision by which he was to be paid the sum of £1,000 per annum free of tax so long as he should continue to act as trustee. Sir Henry Dale appealed against that assessment on the ground that the sum of £1,446 was income arising in respect of remuneration from an office of profit within the meaning of section 14 (3) (a) or, alternatively, that it was income from property which formed part of the emoluments of an office of profit within the meaning of section 14 (3) (b) of the Income Tax Act, 1918, and that it was therefore "earned income." He and the trustees also appealed against notices given to them under section 60 (2) (a) of the Finance Act, 1948, but those were subordinate and consequential appeals, which stood or fell by the decision on the appeal against the assessment of Sir Henry Dale.

The Special Commissioners held that the source of the income was the bequest of an annuity and not an office of profit. Against that determination an appeal was taken to the High Court. There Harman J. allowed the appeal and reversed the determination. In the Court of Appeal, the Master of the Rolls, Romer and Birkett L.JJ. unanimously reversed the decision of Harman J. and restored the determination of the Special Commissioners.

The appellants appealed to the House of Lords.

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Millard Tucker Q.C. and *F. N. Bucher* for the appellants. As to the definition of "earned income" see section 14 (3) of the Income Tax Act, 1918, and section 33 of the Finance Act, 1920. Section 14 (3) defines it as "any income arising in respect of "any remuneration from any office." A main meaning of "remuneration" is "reward," and it can cover more than salary or wages. It can cover tips: see *Calvert v. Wainwright*.¹ It is not confined to the master and servant relationship, for a judge, a Member of Parliament and a barrister's clerk all receive remuneration. The meaning of the word is very wide. The intention of section 14 of the Act of 1918 was to give earned income relief in respect of remuneration from offices taxed under Schedule D or Schedule E. Income coming under one or other of these Schedules, which also satisfies the description of "earned income," comes within this section.

An office may be remunerated otherwise than by salary. It may be remunerated by a block of shares or a house to live in or an annuity. Any of these may be profits which come to them by reason of holding the office: *Corke v. Fry*²; *M'Dougal v. Sutherland*³ and *Inland Revenue Commissioners v. Miller*.⁴ When one has found a person's taxable income under any Schedule or Case one will ask whether it comes within section 14 (3) (a), (b) or (c).

The error of the finding of the Court of Appeal may be demonstrated by the following tests:

(1) Does a trustee of a will or of a settlement hold an office at all within the ordinary meaning of the word? Yes. See *Attorney-General v. Eyres*⁵ (a decision which has never been questioned and should not be questioned now) and *McMillan v. Guest*.⁶

(2) If he does hold an office, is it legally impossible for it to be an office of profit within the ordinary meaning of the words? No, it is not legally impossible because it is not legally impossible for him to make a profit. Whether or not a trustee can legally make a profit depends on whether or not he has been given the power to do so. See Lewin on Trusts, 15th ed., pp. 388, 390; *Bray v. Ford*⁷; *In re Masters*⁸ and *Astley v. New Tivoli Ltd.*⁹

¹ [1947] K.B. 526; 63 T.L.R. 199;
[1947] 1 All E.R. 282.

² (1895) 22 R. 422; 3 T.C. 335.

³ (1894) 21 R. 753; 3 T.C. 261.

⁴ 1928 S.C. 819; [1930] A.C. 222;
46 T.L.R. 207; 15 T.C. 25.

⁵ [1909] 1 K.B. 723; 25 T.L.R. 298.

⁶ [1942] A.C. 561, 564, 566-7;
[1942] 1 All E.R. 606.

⁷ [1896] A.C. 44, 51; 12 T.L.R. 119.

⁸ [1953] 1 W.L.R. 81, 83; [1953]

1 All E.R. 19, 20.

⁹ [1899] 1 Ch. 151, 154.

(3) What are the circumstances which will make an office one of profit? It will be an office of profit (a) if it is capable of giving rise to a profit, or (b) if the profit does in fact arise from that office. See *Cowan v. Seymour*¹⁰; *Delane v. Hillcoat*¹¹; *Henry v. Galloway*¹²; *Oliver v. Chuter*.¹³ In this case the main ground of the decision of the Court of Appeal was that a trustee can never hold an office of profit, but, by analogy, a director of a company can make a profit if the articles of association so allow, and a trustee can make a profit if authorized to do so, but if a settlement allowed the trustee nothing he would not hold an office of profit.

(4) What is the test whether a profit does accrue by reason of, or arise from, an office? The test is whether that profit is received by the holder of the office for, or substantially for, his services in the office. This is so even if the profit arises voluntarily out of somebody's bounty and even if the person giving the profit is a third party and not the natural paymaster of the office; one must then find whether the third party is making the payment to the trustee qua trustee or just as a personal gift. See *Herbert v. McQuade*¹⁴; *Blakiston v. Cooper*¹⁵; *Seymour v. Reed*¹⁶; *Corbett v. Duff*¹⁷; *Calvert v. Wainwright*.¹⁸ All that the appellant is concerned to show is that the sums which come to him are properly described as remuneration from the office of trustee which he holds.

The cases relied on by the Crown and by the Court of Appeal were *In re Pooley*¹⁹; *In re Thorley*²⁰ and *In re White*,²¹ but those authorities lead nowhere so far as the present case is concerned. In *Baxendale v. Murphy*²² the conclusion reached was right but the reasons given therefor were faulty. It is still good law and allowing this appeal would not overthrow the practice based on it.

As to the construction of section 14 (3) (a) and (b) of the Income Tax Act, 1918, the words "of profit" do not qualify the word "office," but only the word "employment." The expression "office or employment of profit" appears in many sections of that Act and in subsequent Finance Acts amending or extending

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¹⁰ [1919] 2 K.B. 146; 35 T.L.R. 444; (C.A.) [1920] 1 K.B. 500; 36 T.L.R. 155.

¹¹ (1829) 9 B. & C. 310.

¹² (1933) 148 L.T. 453; 49 T.L.R. 191; 17 T.C. 470.

¹³ (1934) 18 T.C. 570, 574.

¹⁴ [1902] 2 K.B. 631; 18 T.L.R. 728.

¹⁵ [1909] A.C. 104; 25 T.L.R. 164.

¹⁶ [1927] A.C. 554, 559, 560, 569; 43 T.L.R. 585.

¹⁷ [1941] K.B. 730; 57 T.L.R. 429; [1941] 1 All E.R. 512.

¹⁸ [1947] K.B. 526.

¹⁹ (1888) 40 Ch.D. 1; 5 T.L.R. 21.

²⁰ [1891] 2 Ch. 613; 7 T.L.R. 479.

²¹ [1898] 2 Ch. 217; 14 T.L.R. 503.

²² [1924] 2 K.B. 494; 40 T.L.R. 784.

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it. But originally the word "office" was used in the Act of 1918 and in the Income Tax Act, 1842, only in relation to public offices which were charged under Schedule E. The word "employment" appeared in the phrase "trade, profession, employment or vocation" in Schedule D and in the phrase "every public office or employment of profit" in the charging words of Schedule E. For example, section 156 of the Act of 1842 refers to "commissioners for the duties on offices, or on employments of profit," and that was reproduced as section 73 of the consolidating Act of 1918 thus: "... any commissioner for executing this Act in relation to offices or employments of profit." Also, in Schedule E, Rule 3, of the Act of 1842 the concluding words are "every other public office or employment of profit of a public nature," these being reproduced with the addition of a comma in Rule 6 (k) of Schedule E to the Act of 1918 ("all other public offices, or employments of profit which are of a public nature"). Further, under Head XIV of Schedule V of the Act of 1918 the statement required is expressed as "statement of profits of any public office, or employment of profit, to be charged under Schedule E." In the Acts of 1799 and 1803 the words "of profit" were also used, not in conjunction with the word "office," but only with the word "employment."

At most the expression "office of profit" means no more than that the holder in fact receives, or is legally entitled to receive, for his own use, a monetary payment or other financial advantage given to or conferred on him as a reward for the performance by him of the duties of that office, irrespective of the source from which the reward emanates. In the ordinary use of language any such reward is properly described as income from the office. The appellant's office as executor and trustee of the will fully answers that description, since he was entitled to the annual sum given by the will only so long as he continued so to act. That annual sum was remuneration from his office. He held an office within the meaning of section 14 (3) (a) and (b) of the Act of 1918, and the sum received was remuneration from that office.

The main charging words of Schedule E expressly include "every annuity, pension or stipend payable by the Crown or out of public revenue of the United Kingdom, other than annuities charged under Schedule C." After section 18 of the Finance Act, 1922, transferred to Schedule E profits or gains arising from "an office, employment or pension" formerly chargeable to tax under Schedule D, the charging words of Schedule E had to be taken to include any annuities payable otherwise than by the

Crown so far as they were remuneration of any such office or employment or so far as they were in the nature of a pension (such as those referred to in section 32 (2) of the Finance Act, 1921). The annual sum payable to the appellant is an annuity and is chargeable under Schedule E. But because it is also an annuity of such a nature as to be capable of being properly described as "payable . . . out of profits or gains" of the trust fund "brought into charge to tax" (All Schedules Rules, r. 19 (1)) it remains taxable by deduction under that rule because it is applicable to all Schedules, including Schedule E. If there were in fact no profits or gains of the trust fund in any year sufficient to cover the payment, this would not alter its nature because it would then fall under Rule 21 of those Rules. Section 19 of the Act of 1922, which is complementary to section 18, gives a right of appeal to the Special Commissioners "against the amount of tax deducted" from any income charged to tax under Schedule E. Although this may have been directed (inter alia) to deduction of tax from pensions chargeable by deduction under section 32 (2) of the Finance Act, 1921, it is also applicable to a case such as that of the annual sum payable to the appellant. Further, section 103 of the Act of 1842 refers (inter alia) to "any annuity or annual payment mentioned in Schedule C or E."

An annual sum bequeathed by a will to an executor and trustee thereof, as remuneration for his services as such, is simply an annuity payable out of the property settled by that will and primarily out of the income thereof. An annuity is property which is the right under the will to enjoy the benefit of the annual sum in question: *In re Cassell*²³ and *In re Duke of Norfolk*.²⁴ The annuity payable to the appellant by way of remuneration for his services as executor and trustee of this will is therefore property and, since he is only entitled to the annuity for so long as he serves as executor and trustee, the annuity is property which is attached to his office. The income from that property is the sum annually received by the appellant. Accordingly, that sum is income from property which is attached to his office and therefore falls within the first branch of section 14 (3) (b) of the Act of 1918. Alternatively, the sum is income from property which "forms part of the emoluments of any office or employment of profit" within the meaning of the second branch of section 14 (3) (b).

Section 14 (3) (b) demonstrates that the emoluments of an

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²³ [1927] 2 Ch. 275; 43 T.L.R. 743.

²⁴ [1950] Ch. 467, 478, 479; [1950] 1 T.L.R. 695; [1950] 1 All E.R. 664.

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office or employment can consist of property or an interest in property the income of which may, by virtue of the charging provisions of the Income Tax Acts, be taxable under some other Schedule than Schedule E. Thus a person may be remunerated for his services in an office or employment by being allowed to live in a house rent free: *Corke v. Fry*,²⁵ where the taxpayer was not residing in the house in a purely representative capacity: see also *Reed v. Cattermole*.²⁶ In a case such as the former, the holder of the office, as occupier of the house, would be chargeable to tax on the annual value thereof solely under Schedule A (with no right of recoupment in respect of the tax so paid by him against any other person) and the net Schedule A value thereof would have to be included by him in a return of his total income both for surtax and abatement purposes, as being income from property. It is therefore immaterial that the appellant is in fact remunerated by means of an annuity granted to him by virtue of the terms of the will or that, as a result, the income arising to him by virtue of the grant of that annuity falls to be charged to tax by deduction under Rule 19 of the All Schedules Rules, or under Case III of Schedule D.

In this case the argument is concerned simply with section 14 (3) (a) and (b) of the Act of 1918 and with the question: is the income received, in ordinary language, properly called "remuneration from the office"?

[Reference was also made to *Great Western Railway Co. v. Bater*²⁷; *Jones v. Wright*²⁸; *O'Reilly v. Casey*²⁹; *Hearn v. Morgan*³⁰; *Bray v. Colenbrander*³¹; *Bennett v. Marshall*.³²]

F. N. Bucher following. The descriptive words in section 14 (3) (a) and (b) of the Act of 1918 are not words of art and their meaning is not affected by the words used in the Schedules to the Act. This is supported by Part III of the Act as it originally stood: see sections 9 to 14. It is antecedently probable that income from a Schedule D employment would be "earned" "income" within section 14 (3) (a): see also section 21 (2). The phrase "office or employment of profit" refers (inter alia) to offices and employments formerly chargeable to tax under Schedule D (not offices and employments of profit) and to offices

²⁵ 22 R. 422; 3 T.C. 335.

²⁶ [1937] 1 K.B. 613; 53 T.L.R. 369; [1937] 1 All E.R. 541.

²⁷ [1922] 2 A.C. 1; 38 T.L.R. 448.

²⁸ (1927) 139 L.T. 43; 44 T.L.R. 128; 13 T.C. 221.

²⁹ [1942] I.R. 378.

³⁰ (1945) 173 L.T. 361; 61 T.L.R.

552; [1945] 2 All E.R. 480; 26 T.C. 478.

³¹ [1953] A.C. 503; [1953] 1 All E.R. 1090.

³² [1938] 1 K.B. 591; 54 T.L.R. 320; [1938] 1 All E.R. 93.

or employments of profit under Schedule E. There is no difficulty in saying popularly that the house of a vicar forms part of his emoluments.

Sir Reginald Manningham-Buller Q.C., S.-G., J. Pennycuik Q.C., J. H. Stamp and Sir Reginald Hills for the Crown. The argument has ranged over an extensive field, but the question can be simply expressed: is the money received by the appellant under the will of the deceased "earned income" within section 14 (3) of the Act of 1918? It is said that one should look only at that subsection, but in seeking to construe it, it is wrong to ignore the contents of the Act. The interpretation given to it must be the same in relation to the special contribution and to the purposes of income tax; it must bear the same interpretation wherever it appears in relation to all the parts of the Act to which it applies.

If the argument for the appellants is held to be right, it must produce far-reaching consequences entailing changes in the administration of income tax. Thus, if the position of a trustee is an office within section 14 (3) (a) of the Act of 1918 and the amount which he receives is, although a legacy, remuneration for that office, it must follow that in every case where a trustee under a will receives a legacy from a testator on condition that he executes the office, he can claim that it is earned income and it is not necessary to consider whether or not it is in fact earned, although there might be cases in which the trustee had to do no work for a long time. If the argument for the appellants is right, then once a trustee in the position of Sir Henry Dale has accepted the trust, the annuity will be paid to him without inquiring whether or not he has done any substantial work. Further, remuneration from an office must be regarded as income and not capital, and if the argument for the appellants is right and an annuity given to a trustee is to be regarded as remuneration and therefore as earned income, then pecuniary or lump sum legacies given to trustees on condition that they accept the trust must be remuneration just as much as an annual profit: Simon's Income Tax, 2nd ed., Vol. II, p. 541. Also, a decision in the appellants' favour would result in a transfer of the assessment from Case III of Schedule D and a consequential loss of the advantage which the beneficiaries obtain from Rule 19 of the All Schedules Rules, unless some change were to be made in the present administration and application of that rule.

One should begin by looking at the Act of 1918, apart from section 18 of the Finance Act, 1922. Starting with section 1,

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H. L. (E.) *Fry v. Salisbury House Estate Ltd.*³³ shows the importance generally of considering under which Schedule liability to tax arises. It is clear that, on the construction of the Act, the appellant's income could only be taxed under Schedule D, and could not be taxed under Schedule E because that Schedule is confined to "every public office or employment of profit." *Great Western Railway Co. v. Bater*³⁴ led to the passing of section 18 of the Act of 1922, which transferred to Schedule E profits or gains from "an office, employment or pension" formerly chargeable under Schedule D. Its object was to make Schedule E apply as before that case it had been thought to apply; it cannot have put into Schedule D an office which was not there already. Trusteeship, however, is not an "employment" within Case II of Schedule D, but must fall within Case III, which does not relate to employments. Since *Baxendale v. Murphy*³⁵ an annual sum payable to a testamentary trustee as such has been taxed only under Case III and has been paid after deduction of tax in accordance with Rule 19 or 21 of the All Schedules Rules, and has not been charged by direct assessment under Schedule E. Rule 1 (a) of the Rules applicable to Case III applies, each sum being an "annual payment . . . payable . . . by virtue of any . . . will." This long-standing practice should not be altered to the possible detriment of beneficiaries who might thereby be deprived of the benefit they now derive from the application of Rule 19.

If the sums now in question are correctly taxed under Schedule D and the definition of "earned income" in section 14 (3) of the Act of 1918 does not apply to payments like this made under a will, then they are not "earned income" within that subsection. The subsection does not contain a complete definition of "earned income." One must look at the Schedules, Cases and Rules to ascertain its meaning, for it contains an implicit reference to them and is clearly related to them, so that they throw a light on its meaning. There is such identity between its language and their language as to require reference to the Schedules to determine what categories of income are by the subsection entitled to be regarded as "earned income." Thus, though income might *prima facie* appear to be "income arising" in respect of any remuneration from any office . . . of profit," it cannot be treated as "earned income" unless it falls to be

³³ [1930] A.C. 432, 441, 454; 46 T.L.R. 342.

³⁴ [1922] 2 A.C. 1, 13, 21, 23, 31.

³⁵ [1924] 2 K.B. 494.

taxed eo nomine under one of the Schedules. Thus the definition in section 14 (3) does not and cannot apply to a sum within Rule 1 (a) of Case III, for no income is taxable save under one or other of the Schedules, and one would expect the definition in section 14 (3) to relate to the Schedules and not to be a definition "in the blue" or a "dictionary" definition. The subsection points directly (though not solely) to Schedule E, because only there are found "office" and "employment" in conjunction. It does not "bite" on Case III of Schedule D. It relates to Schedule E and overflows into Case II and Case VI of Schedule D.

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The questions to be decided here are: (1) Is an annual payment under a will, such as this payment, within section 14 (3) (a)? (2) If not, is it within section 14 (3) (b)?

The presence of the word "office" in section 14 (3) (a) is accounted for by Schedule E: see Rule 6 of the Rules applicable to that Schedule. See also *Great Western Railway Co. v. Bater*.³⁶ But trusteeship can never be an office of profit within the Income Tax Acts. As to the effect of section 18 of the Act of 1922, see *Davies v. Braithwaite*.³⁷ Section 14 (3) (a) only relates to Schedule E offices and to offices covered by the word "employment" in Case II of Schedule D and the overflow of offices into Cases V and VI. These only qualify as producing "earned income." An office within Case II would be an office covered by the word "employment," being one in the nature of a post, embracing something in the nature of the relationship of master and servant. If Sir Henry Dale was properly assessed under Case III, and the word "office" in section 14 (3) (a) has the meaning suggested by the Crown, his income cannot be treated as "earned income" within that paragraph. Nor does the annuity fall within the definition in section 14 (3) (b) as being "income from any property which is attached to or forms part" "of the emoluments of any office or employment of profit" held by Sir Henry Dale.

But, even if section 14 (3) contains a "dictionary" definition, the trustee does not hold an "office" in the sense in which it is used in the Income Tax Acts. There are many different meanings of the word "office," e.g., service: see Bushy in Richard II, Act II, Scene 2: "... little office the hateful Commons will "perform for us." *Attorney-General v. Eyres*³⁸ is the only case

³⁶ [1920] 3 K.B. 266, 273; (C.A.)
[1921] 2 K.B. 128, 139-40.

³⁷ [1931] 2 K.B. 628, 636; 47
T.L.R. 479.

³⁸ [1909] 1 K.B. 723.

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Further, to come within section 14 (3) (a) the taxpayer must hold an "office of profit," which is in a sense a term of art. It is an office to which remuneration naturally attaches—one which would normally be regarded as carrying payment. In the definition of "office" in Stroud's Judicial Dictionary, 2nd ed., pp. 1322-5 (published before *Attorney-General v. Eyres*³⁸) there is no reference to a trustee. (There is no separate definition of "office of profit.") No trustee can ever hold an office of profit. It is inconsistent with trusteeship that it should be such an office, for there is a fundamental repugnance between the two. A trustee can only receive a legacy or a gift. The appellant cannot succeed on this point without submitting that *Baxendale v. Murphy*³⁹ was wrongly decided. The principle laid down in that case and in *In re Thorley*⁴⁰ was that if a person was left a legacy of a particular sum on condition of holding a certain position the question of earning it did not arise. The position of a solicitor who is a trustee or executor was considered in *In re Pooley*⁴¹ and *In re White*.⁴² A solicitor would normally have to send in an account or bill, so that the source of his remuneration is the work he does and not, as in the case of other persons, the will or other instrument. If a testator authorized remuneration which was double the value of his work to be given to a solicitor acting as trustee (i.e., double what he would be entitled to charge on a quantum meruit), that might be regarded as 50 per cent. bounty or gift and 50 per cent. earned income. The difficulty would be that there is no machinery for apportionment. A solicitor would be in a completely different position from a trustee who was given a lump sum on condition of accepting the trust irrespective of the work entailed. In the latter case there would be no source of the sum received other than the will.

As to the cases cited: it is hard to find the ratio decidendi of *Hearn v. Morgan*.⁴³ It is not essential for either of the parties to this appeal to support or to attack what Younger L.J. said in *Cowan v. Seymour*.⁴⁴ *Delane v. Hillcoat*,⁴⁵ *Henry v. Galloway*⁴⁶ and *Oliver v. Chuter*⁴⁷ are not authorities for the proposition

³⁸ [1909] 1 K.B. 723.

³⁹ [1924] 2 K.B. 494.

⁴⁰ [1891] 2 Ch. 613, 624, 625, 626, 628.

⁴¹ 40 Ch.D. 1, 3.

⁴² [1898] 2 Ch. 217.

⁴³ 173 L.T. 361; 26 T.C. 478.

⁴⁴ [1920] 1 K.B. 500, 517.

⁴⁵ 9 B. & C. 310.

⁴⁶ 148 L.T. 453; 17 T.C. 470.

⁴⁷ 18 T.C. 570.

that payment will convert a gratuitous office into an office of profit. H. L. (E.)

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[Reference was also made to *Inland Revenue Commissioners v. Duke of Westminster*⁴⁸; *Kemp v. Evans*⁴⁹; *In re Hanbury*⁵⁰; *Inland Revenue Commissioners v. City of London (as Epping Forest Conservators)*⁵¹; *Bray v. Colenbrander*⁵²; *Cameron v. Prendergast*⁵³ and *Tilley v. Wales*.⁵⁴]

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Pennycuik Q.C. following. The whole case turns on the construction of section 14 (3) (a) of the Act of 1918 and the meaning to be given to its words in their context. What is the nature of the remuneration payable to Sir Henry Dale? Do the words of the paragraph apply to that remuneration according to its proper character? Section 14 (3) comes after the main charging provision (section 1), which incorporates the Schedules, and it must be construed with reference to them. If one finds in it expressions describing certain sources of income and also finds substantially the same expressions in the Schedules, it would be strange if the latter were held to describe different categories, so as to give different meanings to closely related expressions in the same Act. *Prima facie*, the words "earned income" will bear the same meaning in both places.

The natural meaning of "office of profit" would not cover a private trustee, and the Crown's contention is better common sense, particularly in relation to a sinecure. In certain contexts one would say that a trustee holds an office of profit, but not in this context. There are very many offices which are not offices of profit. The office of a Town Clerk always carries remuneration save in exceptional circumstances; it belongs to a class of offices of that character, and it is proper normally to describe them as offices of profit. But trusteeship is a class of office which does not carry remuneration save in exceptional circumstances, and it is unnatural in ordinary speech to describe it as an office of profit in the case of a trustee who owing to exceptional circumstances can receive remuneration. The Crown's contention corresponds more closely to the common sense of the matter than that of the appellant. Sir Henry Dale may well earn this money. But in the case of the ordinary trustee it is

⁴⁸ [1936] A.C. 1, 26; 51 T.L.R. 467.

⁴⁹ (1935) 20 T.C. 14, 19, 22.

⁵⁰ (1942) 20 A.T.C. 332, 333, 334, 335.

⁵¹ [1953] 1 W.L.R. 652, 658; [1953] 1 All E.R. 1075.

⁵² [1953] A.C. 503, 512.

⁵³ [1940] A.C. 549; 56 T.L.R. 499.

⁵⁴ [1943] A.C. 386, 393, 394; 59 T.L.R. 178; [1943] 1 All E.R. 280.

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different; he has responsibilities, but in the ordinary case of a private trust he does not do a great deal. If the appellants' argument were to succeed one could evade tax by nominating many of one's own relations trustees without any regard to the exact value of their services to the trust estate. Sir Henry Dale's case is an extreme one. The time-honoured conception of a trustee is that of a relative or friend of the family who performs his duties for affection and is not remunerated. What a man receives for looking after his family affairs is not in the ordinary sense "earned income." Also it is hard to imagine a private office which is not also an employment. An office is a particular kind of employment.

The appellants' argument involves overruling *Baxendale v. Murphy*.⁵⁵ That case was decided under the Act of 1918. It was not concerned with reconciling section 14 (3) with the Schedules. It would have been decided in the same way after the Act of 1922, section 18 of which only transferred to Schedule E those profits or gains arising from an office or employment which were chargeable as such to tax under Schedule D. Nothing then went into Schedule E which was not already so chargeable under Schedule D. Section 18 had no application to profits or gains which under the existing Schedule D were chargeable under some different head. Accordingly, the annual payments to these trustees were not transferred to Schedule E. If the section had been intended to bring under Schedule E profits chargeable as annual profits, it would have used different words. These annual payments are conditional annuities.

Tucker Q.C. in reply. *Cameron v. Prendergast*⁵⁶ does not lead inevitably to the conclusion that if Sir Henry Dale had been given a lump sum that would necessarily have been chargeable to tax. *Hearn v. Morgan*⁵⁷ and *O'Reilly v. Casey*⁵⁸ can both stand. One can remunerate a person for his services by something other than a salary, e.g., by giving him a house to live in rent free, or by letting him shoot game on one's land.

Sir Henry Dale receives, not a salary, but an annual payment of the type to which Rule 19 of the All Schedules Rules applies. Schedule E will only catch salaries in the proper sense. Section 18 of the Act of 1922 only applies to remuneration always assessable on the recipient.

⁵⁵ [1924] 2 K.B. 494.

⁵⁶ [1940] A.C. 549.

⁵⁷ 173 L.T. 361; 26 T.C. 478.

⁵⁸ [1942] I.R. 378.

[*Sugden v. Leeds Corporation* ⁵⁹ and *Inland Revenue Commissioners v. Duke of Westminster* ⁶⁰ were also referred to.] H. L. (E.)

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Their Lordships took time for consideration.

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July 20. LORD NORMAND. My Lords, we have in this appeal to decide a question of importance in income tax law, though it arises in relation to the special contribution imposed by Part V of the Finance Act, 1948. The question, shortly stated, is whether an annuity bequeathed by the will of the late Sir Henry Wellcome to the appellant, Sir Henry Dale, as executor and trustee under the will is "investment income."

The special contribution imposed by the Finance Act, 1948, is payable by individuals whose total income for the year 1947-48 exceeded £2,000 and whose aggregate investment income for that year exceeded £250. "Investment income" means income from any source other than a source of earned income (section 49 (1) of the Finance Act, 1948). Expressions in Part V of the Finance Act, 1948, are, under section 48 (2) thereof, to have the same meanings as in the Income Tax Acts. Section 14 (3) of the Income Tax Act, 1918, provides: "For the purposes of this 'section the expression 'earned income' means (a) any income arising in respect of any remuneration from any office or employment of profit held by the individual, or in respect of any pension, superannuation, or other allowance, deferred pay, or compensation for loss of office, given in respect of the past services of the individual or of the husband or parent of the individual in any office or employment of profit, or given to the individual in respect of the past services of any deceased person, whether the individual or husband or parent of the individual shall have contributed to such pension, superannuation allowance, or deferred pay, or not; and (b) any income from any property which is attached to or forms part of the emoluments of any office or employment of profit held by the individual; and (c) any income which is charged under Schedule B or Schedule D, or the rules applicable to Schedule D, and is immediately derived by the individual from the carrying on or exercise by him of his trade, profession, or vocation, either as an individual, or, in the case of a partnership, as a partner personally acting therein."

The question in the appeal is, in the simplest terms, whether

⁵⁹ [1914] A.C. 483, 490; 29 T.L.R. 402.

⁶⁰ [1936] A.C. 1.

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the annual sum receivable by the appellant under the testator's will is income arising in respect of remuneration from an office of profit. It is not contended that it is income from an "employment of profit," for that contention would encounter the difficulty discussed in several of the reported cases that there is no employer. The words "of profit," I have no hesitation in saying, qualify the word "office." The first point to consider is whether trusteeship is within the ordinary sense of the word an "office," and on this I can only say that "office" is an apt word to describe a trustee's position, or any position in which services are due by the holder and in which the holder has no employer. In *Attorney-General v. Eyres*¹ Channell J. held that a trustee is "the holder of an office" within the meaning of section 2 (1) of the Finance Act, 1894. The word "office" is used both in section 14 (3) of the Income Tax Act, 1918, and in section 2 (1) of the Finance Act, 1894, in its ordinary sense, uncontrolled by any special context, and I agree with Channell J. in thinking that it includes trusteeship. If the trustee is given an annuity under a will on condition that he continues to act as trustee, I cannot doubt that he holds an office of profit. The phrase is not a term of art, and there is again no context which prevents it from being understood in its ordinary sense. To my mind, a remunerated office is an office of profit. Equally clearly the income received by the appellant because he continues to act as trustee is income arising in respect of remuneration from his office of trustee. My conclusion is that the opening words of section 14 (3) (a) seem clearly and unambiguously to apply to the disputed income in the present case, and that was, I think, the ground on which Harman J. decided the case in favour of the appellant.

What, then, is said on the other side? The learned Master of the Rolls held that a trustee could not be described as the holder of an office of profit because² "the office itself involves a denial "of any right to make a profit out of its performance." In other words, the receipt of a profit for the performance of the duties of a trustee is repugnant to the nature of trusteeship.

My Lords, it is with regret that I feel constrained to differ from the Master of the Rolls, but I think that he has here incorrectly described the fiduciary duty of trustees. The fiduciary duty may arise not only from trust but also ex lege and ex convention. The duty was recognized by the Civil Law and

¹ [1909] 1 K.B. 723; 25 T.L.R. 298.

² [1952] Ch. 704, 716.

it is, I think, acknowledged in the jurisprudence of all civilized communities. The duty is, to use the Latin phrase, that the person subject to it must not become auctor in rem suam. It applied to tutors and curators in the civil law; and it applies to tutors and curators in the Scots law. It applies also to judicial factors appointed by the courts in Scotland, and to partners, to agents under a contract of agency, and, of course, to trustees under a settlement or under a will. That by no means exhausts the area of its operation: but for illustrative purposes the examples I have given will suffice. Some who are subject to the duty are never entitled to remuneration; some are *ex lege* entitled to payment for their services; some are entitled to payment *ex convention*e, and some are entitled to payment if the settlor or testator so directs. The rule is the same for all: it is not that reward for services is repugnant to the fiduciary duty, but that he who has the duty shall not take any secret remuneration or any financial benefit not authorized by the law, or by his contract, or by the trust deed under which he acts, as the case may be. In England, moreover, the court has power to order payments to be made to trustees for whom the truster has made no such provision, a power which it is difficult to reconcile with a general principle that remuneration is repugnant to trusteeship. The true rule is indeed stated by the Master of the Rolls himself in the judgment under consideration. He says³: "It has long "been established that, *in the absence of some special dispensation*," (the italics are mine) "a trustee can never derive any "profit or advantage for himself out of his trust and should be "scrupulous to prevent any conflict between his duty and his "interest."

The Master of the Rolls referred to certain cases (*In re Pooley*,⁴ *In re Thorley*,⁵ *In re White*⁶) which, as he said,⁷ decided "that remuneration made payable to a trustee by the "terms of the instrument of trust is properly regarded as bounty "on the part of the settlor or testator, in all material respects "on the same footing as the bounty conferred on the other "beneficiaries under the trust instrument and distinguished only "from those others by the characteristic that acceptance of the "obligation of the 'office' is the condition on which the benefit "may be taken." I think there is confusion here between the

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³ Ibid. 715.⁴ 40 Ch.D. 1; 5 T.L.R. 21.⁵ [1891] 2 Ch. 613; 7 T.L.R. 479.⁶ [1898] 2 Ch. 217; 14 T.L.R. 503.⁷ [1952] Ch. 704, 715.

H. L. (E.) source of the payment, which is the testator's bounty as expressed in his will, and the quality of the payment as earned or not earned. There need be no incompatibility in saying that the income is the conditional gift of the testator but that it has to be earned by compliance with the testator's condition of serving as a trustee.

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I would observe more generally that the question whether income is earned or not is a question which arises between the trustee and the Inland Revenue, and it has no relation either to the legal duty which a trustee owes to the trust and the beneficiaries, or to the legal conception that such a payment as that under consideration derives from a testator and can be regarded as a legacy. The source of the sum and its character as a receipt in the hands of the trustee are two separate and unconnected things.

In my opinion, therefore, the reasoning on which the Master of the Rolls proceeded and in which the other learned Lords Justices concurred does not justify us in refusing to give the ordinary meaning to the words of section 14 (3) (a) which are now under consideration.

My Lords, counsel for the Crown urged another view of section 14 (3). It is not, they said, a self-contained definition, or, as they phrased it, a dictionary definition. It contains, so the argument ran, an implicit reference to the Schedules of the Act and their cases and rules, and there is such identity of the language of the subsection with the language of the Schedules as to require reference to the Schedules in order to determine what categories of income are by the section entitled to be regarded as earned income. For example, no income which appears on first reading of the subsection to be income arising from remuneration in respect of an office of profit is to be treated as earned income unless it falls to be taxed *eo nomine* (that is, as income arising from remuneration in respect of an office of profit) under one of the Schedules. Now, since 1924 (*Baxendale v. Murphy*⁸) annual remuneration payable to a testamentary trustee qua trustee has been regarded as taxable only under Case III of Schedule D, and as payable after deduction of tax in accordance with Rule 19 or 21 of the All Schedules Rules. The rule applicable was, it was held, Rule 1 (a) of Case III, and the sum payable annually to the trustee was taxed under the head or description an "annual payment . . . payable . . . by virtue of any . . . will."

⁸ [1924] 2 K.B. 494; 40 T.L.R. 784.

Counsel for the Crown contended that income of this kind was properly taxed under Case III and under that description, and that in any event the long-standing practice should not be altered to the possible detriment of beneficiaries who might in consequence be deprived of the benefit which they at present derive from the application of Rule 19. Nor did Mr. Tucker, for the appellant, press us to hold that it was wrong to tax this income under Case III.

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In my judgment this argument breaks down in limine. First, the charging section (section 47 (1)) imposes the special contribution only on investment income and there is no charge on any income which is not investment income. It then becomes necessary to define "investment income." That was achieved by section 49 (1) of the Finance Act, 1948, and by section 14 (3) of the Income Tax Act, 1918. By section 49 (1) "investment income" means income from any source other than a source of earned income. There is no reference here to the Schedules. Section 14 (3) defines "earned income." It is a definition which, by paragraph (a), enlarges rather than narrows the meaning which "earned income" might normally bear, for it includes as earned income payments made to the husband or parent in respect of the past services of a deceased wife or son. The conception "investment income" cuts across the Schedules to the Act, and accordingly paragraph (a) does not treat the Schedules or Cases as divisible into those which tax earned income and those which tax investment income. The natural inference from reading the subsection as a whole is that you may find in any one of the Schedules or Cases income from a source of earned income. It is significant that paragraph (c) expressly refers to Schedules B and D, and to certain income taxed under these Schedules. It appears, therefore, that the Schedules are referred to when reference to them is necessary or appropriate, and that reference to them is omitted when it is not necessary or appropriate. Then it is to be noted that the language of section 14 (3) (a) does not in fact correspond with the language of the Schedules. For example, the phrase "emolument of any office or employment of profit" is not Schedule language, and the only mention of "office" in the Schedules is to be found in Schedule E, where there is a limitation, absent in section 14 (3) (a), to "public offices." I therefore reject the contention that section 14 (3) is not a self-contained definition of "earned income."

My Lords, many cases were cited on this part of the argument. They dealt with the question which Schedule, Case or rule is the

H. L. (E.) appropriate Schedule, Case or rule for taxing annual payments receivable by a trustee as such. Some may need consideration on a future occasion, but they are of no relevance to the appeal if section 14 (3) is a self-contained definition, and I think that it would be inexpedient to discuss them.

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I must, however, notice an argument *ab inconvenienti* advanced by the Crown. It was said that a decision in favour of the appellant would involve anomalies. An argument of this sort is of value as an aid to construction only if there is some ambiguity in the words to be construed. At best, it is an unhandy weapon. For it often means that the court is to attempt to construe the difficult language of that part of an enactment which is properly before it for construction by the aid of another part of the enactment which is not really before it at all. It is therefore a method which should be shunned unless there is agreement or it is perfectly plain that the decision proposed will in fact lead to the supposed anomaly. Lastly, it cannot be right to decide an action on a balance of competing anomalies when anomalies must arise whatever construction be adopted.

Since I have already said that I find no ambiguity in the language of section 14 (3) (a), the whole argument *ab inconvenienti* falls to the ground, but it may be useful to record what were the anomalies which the Crown said must result from the decision of this appeal in the appellant's favour. First, it was said that it would result in a transfer of the assessment from Case III of Schedule D to Schedule E and a consequential loss of the advantage which the beneficiaries obtain from Rule 19. This is disputed by the appellant's counsel, and the dispute led to the citation of a number of authorities and an examination of the Schedules and of section 18 of the Finance Act, 1922. I cannot say that the matter is at all clear, and I will express no opinion about it, nor shall I refer to the authorities, some of which may yet have to be reconsidered. Secondly, it was said, that if the appellant is to succeed, any bequest of an annuity to a trustee payable so long as he continues to be a trustee will be earned income within the meaning of section 14 (3), without any inquiry as to the amount of work done to earn it. This is, I think, true, and it must clearly be understood that the appellant succeeds because he has complied with the condition, by continuing to act as trustee, and not because he has in fact performed very valuable and unusual services outside the ordinary scope of a trustee's duty. But if the Crown is right, we have the anomaly

that the appellant must be regarded as having received investment income and as having earned nothing by his services, though it is obvious from the testator's will that he expected services from his trustees. Thirdly, it is said that if an annuity given to a trustee as such is to be regarded as remuneration and therefore as earned income, so also must a lump sum legacy given to a trustee on condition of his accepting the trust. This proposition is denied by Mr. Tucker and the controversy is not one which can be decided in this appeal.

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It has become unnecessary to consider section 14 (3) (b) in detail. But in my opinion it does not apply to the annuity enjoyed by the appellant under Sir Henry Wellcome's will.

The appeal should be allowed with costs throughout.

LORD OAKSEY. My Lords, I have had the advantage of reading the opinion of the noble Lord on the Woolsack, and I agree with it. As, however, your Lordships are differing from the considered judgments of the Court of Appeal, I wish to add a few words on certain points.

The judgment of the Master of the Rolls proceeds upon the basis that trusteeship is an office but that it is not an office of profit because ⁹ "it has long been established that, in the absence of some special dispensation, the trustee can never derive any profit or advantage for himself out of his trust." But as in the present case there is a special dispensation, I am unable to see how this trusteeship can be said not to be an office of profit. It is said that the special dispensation proceeds from the bounty of the testator, but, in my opinion, it is no more a matter of bounty than the appointment of a particular person to any office of profit may be said to be the bounty of the person who makes the appointment. The condition upon which the appointment is made is the performance of the office. The words "office of profit" do not relate to the creator of or appointer to the office but to the holder of the office, and whether the emoluments of the office come from the bounty of the creator of or appointer to the office or not they are profits of the office from the point of view of the holder of the office, who is entitled to consider, as it seems to me, that the profits are paid to him as remuneration for performance of the office and not as the bounty of anyone.

I see no sound distinction between solicitors who are

⁹ [1952] Ch. 704, 715.

H. L. (E.) frequently appointed trustees under wills which provide that they shall be remunerated and the case of Sir Henry Dale. The only distinctions suggested are that a solicitor is a professional man and remunerated according to costs settled by law, but, in my opinion, Sir Henry Dale is also a professional man, and money is just as much earned when it is paid on an annual basis as when it is paid on a quantum meruit.

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The cases of tips to waiters and cab drivers are dismissed by the Court of Appeal by saying that trusteeship has an almost sacred character which involves a denial of any right to make a profit out of its performance. If the character of trusteeship did involve such a denial it would, of course, be true to say that there is no analogy with the case of gratuities, but in point of fact it is admitted that trusteeship does not involve any such denial. Gratuities may, in my opinion, much more accurately be said to be the bounty of the payer than an annual payment fixed before the creation of the office and payable only so long as the office is performed.

LORD MORTON OF HENRYTON. My Lords, I, too, would allow this appeal. The only question which arises for decision is whether the sum received by the first appellant, Sir Henry Dale, as trustee of the will of Sir Henry Wellcome deceased, during the fiscal year 1947-48, was or was not "earned income" as defined by section 14 (3) of the Income Tax Act, 1918. The appellants contend that this sum comes within section 14 (3) (a) as being income arising in respect of remuneration from an office of profit held by the first appellant.

My Lords, in agreement with the Court of Appeal, I feel no doubt that the trusteeship of this will is an "office." Is it an "office of profit"? These are not words of art, and I can find no context in the Act of 1918 which should lead your Lordships to give them a meaning which they would not ordinarily bear. To my mind an "office of profit," in the ordinary sense of the words, is an office which carries with it remuneration, as distinct from an honorary office. The testator in the present case has undoubtedly attached remuneration to the office of trustee of his will. The Master of the Rolls and Romer L.J. point out that this remuneration is regarded as bounty on the part of the testator, and that for this reason the trustee can never compete with creditors for his remuneration. See *In re Thorley*¹⁰; *In re*

¹⁰ [1891] 2 Ch. 613.

White.¹¹ I agree, but in my view these facts are in no way inconsistent with the first appellant's office of trustee being an office of profit. The testator chose to make it an office of profit by attaching remuneration thereto. The first appellant was free to accept or reject that office. He chose to accept it with its remuneration, and, to my mind, from the moment of acceptance he held an office of profit and the remuneration was in his hands remuneration from that office of profit. If so, it comes exactly within the words of section 14 (3) (a) of the Act of 1918, and the fact that it had its origin in the bounty of the testator seems to me irrelevant.

With regard to the argument *ab inconvenienti* advanced by the Crown, I agree with all that has been said by my noble and learned friend on the Woolsack, and I have nothing to add thereto.

LORD REID. My Lords, I have had the opportunity of reading the speech of my noble and learned friend on the Woolsack. I agree with it and I cannot usefully add anything to it.

LORD COHEN. My Lords, I agree entirely with the observations that have fallen from my noble and learned friend on the Woolsack, and I only desire to add a few words of my own to explain why I differ from the Court of Appeal.

As I read the judgments of the Master of the Rolls and Romer L.J. they base their conclusion on one ground only, namely,¹² that: "The office of trustee is . . . an office of honorary " service and not an office of profit—so much so indeed that if a " trustee makes a profit out of his trusteeship he gets into serious " trouble." The authorities cited for this proposition are *In re Pooley*¹³; *In re Thorley*¹⁴; and *In re White*.¹⁵ In *In re Pooley*¹⁶ a direction that a solicitor-trustee should be entitled to charge for his services as a solicitor was held to be a beneficial interest under the will and to be void under section 15 of the Wills Act, 1837, as the trustee in question had witnessed the will. In *In re Thorley*¹⁷ it was held that annual sums payable under the will of a testator to his trustees while they were carrying on the testator's business, and to his son while managing the business in conjunction with the trustees, were legacies liable

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¹¹ [1898] 2 Ch. 217.

¹² [1952] Ch. 704, 721.

¹³ 40 Ch.D. 1.

¹⁴ [1891] 2 Ch. 613.

¹⁵ [1898] 2 Ch. 217.

¹⁶ 40 Ch.D. 1.

¹⁷ [1891] 2 Ch. 613.

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to legacy duty under section 4 of the Stamp Duties Act, 1845. In *In re White*¹⁸ it was held that a solicitor-trustee is not entitled to profit costs when the estate is insolvent since the authority to him to receive such costs is an act of bounty by the testator and no legatee can claim bounty until the creditors are satisfied.

These cases undoubtedly establish that a trustee cannot make a profit out of his trusteeship unless authorized so to do by the instrument creating the trusteeship or by an order of the court, and that if a testator attaches remuneration to the trusteeship, that remuneration is as between the trustee and the estate bounty, liable to legacy duty while that duty was leviable and postponed to the claims of creditors if the estate was insolvent, but it is clear and was, I think, admitted, that a trusteeship is an office, and I am unable to see anything in these decisions which prevents a trusteeship being properly described as an office of profit if a testator creates the office and attaches remuneration to it. On the contrary, the expression "office of profit" seems to me an exact description of the trusteeship so created.

I would add that a decision that the source of a payment is the bounty of the testator seems to me of little relevance to the question which arises between the trustee and the Inland Revenue as to its character as a receipt in the hands of the trustee.

The Master of the Rolls was, I think, also influenced by the argument addressed to the Court of Appeal and repeated before this House that acceptance of the appellant's case would disturb a long-established practice operating to the benefit of the persons interested in trust premises in the great majority of cases. I agree with my noble and learned friend, Lord Normand, that this is a consideration which could only influence your Lordships' decision if the meaning of section 14 (3) of the Income Tax Act, 1918, were ambiguous and that in the present case, for the reasons he gives, there is no ambiguity. For this reason I, too, prefer to express no opinion as to whether this argumentum in terrorem was well founded.

For these reasons I am able to arrive at the conclusion which was reached by Harman J. and which, as I read the judgments in the Court of Appeal, they, too, would have been glad to accept had they not felt themselves bound by authority to reject it. In doing so I do not think your Lordships will detract from

¹⁸ [1898] 2 Ch. 217.

the fundamental principle of equity law that a trustee cannot receive anything for his services except so far as he may be authorized so to do by the instrument creating the trust or by the court. I would allow the appeal and restore the order of Harman J.

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Appeal allowed.

Solicitors: Markby, Stewart & Wadesons; Solicitor of Inland Revenue.

GOBERDHANBHAI BHAILALBHAI PATEL . APPELLANT;
AND
GHELABHAI PREMABHAI RESPONDENT.

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ON APPEAL FROM THE FIJI COURT OF APPEAL.

Fiji—Partition—Tenants in common—“Decree for partition” and “division” different matters—Decree for partition not prohibited by Ordinance regulating subdivision of property—Right to order for sale—Partition Act, 1868 (31 & 32 Vict. c. 40), ss. 3, 4—Supreme Court Ordinance, 1875 (Laws of Fiji, c. 2), ss. 35, 36, 37—Subdivision of Land Ordinance, 1937 (Laws of Fiji, c. 121), ss. 3, 5, 11.

By section 4 of the Partition Act, 1868, which, pursuant to provisions of the Supreme Court Ordinance of Fiji, was in force in the colony as from January, 1875, “subject to any existing or “future Ordinance of the Colonial legislature”: “In a suit for “partition, where, if this Act had not been passed, a decree for “partition might have been made, then, if the party or parties “interested, individually or collectively, to the extent of one “moiety or upwards in the property to which the suit relates “request the court to direct a sale of the property . . . the court “shall . . . direct a sale . . .”

A “decree for partition” of property and its “division” or “subdivision” are two different matters, and a decree for partition can be made without an order for subdivision forming part of the decree. The Subdivision of Land Ordinance of Fiji, 1937, as subsequently amended, which provides that “no land to which “this Ordinance applies shall be subdivided without the prior “approval of the board” set up by the Ordinance, does not prohibit the making of a decree for partition, but only the actual division of the land or the carrying out of a decree for partition without the consent of the board.

* *Present*: LORD PORTER, LORD OAKSEY, MR. T. RINFRET (CHIEF JUSTICE OF CANADA) and MR. L. M. D. DE SILVA.

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Where, therefore, the appellant, a tenant in common holding "one moiety or upwards" of certain land in Fiji, applied for an order partitioning the property or, in the alternative, for an order for sale, a direction for sale was permissible under the terms of the Partition Act of 1868:—

Held, that such right had not been taken away from the appellant by the Ordinance since a decree for partition might have been made (though it could not have been implemented by actual division of the property since it was conceded that partition was not a practical or economic proposition).

Judgment of the Fiji Court of Appeal reversed.

APPEAL (No. 40 of 1952) from an order of the Fiji Court of Appeal (August 22, 1952) reversing an order of the Supreme Court of Fiji (May 29, 1952).

The litigation which led up to this appeal was commenced by an action instituted on November 23, 1951, whereby the present appellant as plaintiff asked for partition or, in the alternative, sale of certain land in Fiji which he and the respondent held as tenants in common in equal shares. The facts were not in dispute and were stated as follows by the Chief Justice in his judgment in the Supreme Court: "The plaintiff and "defendant are the registered proprietors as tenants in common "of two adjoining plots of land upon which stand buildings used "for commercial and residential purposes. Prior to a date in "1947 the parties were occupying the land and buildings and "were engaged in running a commercial enterprise therein as "partners together with one Champaklal. The plaintiff owned "a half-share in the business and the defendant and Champaklal "owned the other half. In 1947 the plaintiff decided to pay "a visit to India, and before leaving he entered into a written "contract with his two partners in terms of which he disposed "of his share in the business to his two partners, the defendant "and Champaklal, subject to a condition that on his return from "India he should have the option to re-join them as a partner. "At the same time he entered into a tenancy agreement with "the defendant and Champaklal under which he leased his "undivided half-share in the property to them for a term of four "years commencing from March 1, 1947. On his return to Fiji "in March, 1951, the plaintiff desired to exercise his option to "re-enter the business, but he failed to come to any agreement "with the defendant and his partner because they wished to "impose conditions which he could not accept. He states that "the defendant and his partner are now in possession of the "whole premises without his consent and against his will and

“ that he has failed to come to any suitable or satisfactory
 “ arrangement with the defendant and his partner. He applies
 “ for an order partitioning the property or, in the alternative, an
 “ order for sale. He admitted in evidence that owing to the
 “ form of the buildings and their position relative to the two
 “ properties and their accessibility, a fair partition would be
 “ extremely difficult either of each plot separately or of the two
 “ plots together. I accept his evidence on these points—indeed,
 “ it is clear from the plans and the evidence as to the buildings
 “ that partition is not a practical or economic proposition.”

Section 4 of the Partition Act, 1868, which was in force in
 Fiji by virtue of the Supreme Court Ordinance of Fiji, provided :
 “ In a suit for partition, where, if this Act had not been passed,
 “ a decree for partition might have been made, then, if the party
 “ or parties interested, individually or collectively, to the extent
 “ of one moiety or upwards in the property to which the suit
 “ relates request the court to direct a sale of the property . . .
 “ the court shall . . . direct a sale . . . ”

By section 5 of the Subdivision of Land Ordinance, 1937 (as
 amended by section 2 of the Subdivision of Land (Amendment)
 Ordinance, 1946) : “ Notwithstanding the provisions of any other
 “ law for the time being in force no land to which this Ordinance
 “ applies shall be subdivided without the prior approval of the
 “ board ” set up under the Ordinance.

Vaughan C.J. in the Supreme Court said : “ I can find nothing
 “ in the Subdivision of Land Ordinance which expressly or by
 “ implication takes away the common law jurisdiction of this
 “ court, exercised by virtue of sections 36 and 37 of the Supreme
 “ Court Ordinance (c. 2) to order a partition when such order
 “ could lawfully be made. . . . I see no reason why the court
 “ should not make an order directing partition and at the same
 “ time suspend the operation of the order until satisfied that the
 “ requirements of the Ordinance had been complied with. I
 “ find that this court has not lost its common law jurisdiction
 “ to make an order directing the partition of property and there-
 “ fore the case is one where, in the terms of the Partition Act,
 “ 1868, a decree for partition might have been made. It follows
 “ that the court has power, in pursuance of the terms of the
 “ Partition Act of 1868 to make an order directing the sale and
 “ distribution of the proceeds.” He directed accordingly.

On appeal, the Fiji Court of Appeal (Carew P., Hieatt and
 Russell JJ.) held : “ We are of opinion that whilst the Chief
 “ Justice correctly expounds the law relating to his jurisdiction

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J. C. “ at common law and under the Partition Act, 1868, he has in
 1953 “ fact failed to have regard to the provisions of the Subdivision
 ——— “ of Land Ordinance, c. 121. It is clear, under section 11 of that
 PATEL “ Ordinance, that subdivision, which we hold for the purposes
 v. “ of this case to be the same as partition, cannot be granted by
 PREMABHAI. “ the Subdivision of Land Board in relation to the land the
 ——— “ subject-matter of this appeal, except in the circumstances
 “ specified in the proviso to that section. . . . Thus it appears
 “ to us that in the circumstances of this case no order for partition
 “ could properly be made by the Chief Justice or this court. It
 “ follows, therefore, by virtue of the fact that the Partition Act,
 “ 1868, limits the power of the court to order a sale to cases in
 “ which an order for partition could be made, that no order for
 “ sale should have been made in this case.”

The appellant appealed.

1953. June 30; July 2. *L. M. Jopling* for the appellant.
 Until the Partition Act of 1868 there was a right to a decree for partition as of right (*Turner v. Morgan*¹), but under section 4 of that Act in a case where a party would have had a right to a decree for partition if the Act had not been passed, he was in the circumstances mentioned in the section entitled to a decree for sale. In 1875, under sections 35, 36 and 37 of the Supreme Court Ordinance of Fiji the English law was applied to Fiji as therein provided, so that at that time the appellant, on the facts of this case, could have had a decree for sale. The question is whether the Fiji Subdivision of Land Ordinance, c. 121 of 1937, which relates to subdivision of land and which, it is submitted, is concerned with quite a different subject-matter and is really an Ordinance of a town-planning character, does, as has been held by the Fiji Court of Appeal, take away the right which both courts below held that the appellant had before the passing of the Ordinance of 1937—the right to a sale. The submissions are, first, that on the true construction of section 4 of the Partition Act, 1868, where under the law in force at the commencement of the Act a decree for partition might have been made, a decree for sale could be made. Secondly, that although the word “subdivide” is defined in section 3 of Ordinance No. 121 to include “partition,” on the true construction of the Ordinance “partition” means physical division. It is not talking about division of ownership, and does not include a decree for partition.

¹ (1803) 8 Ves. 143.

Thirdly, if that is wrong, then on the familiar law of the interpretation of statutes, a statute is not deemed to take away rights under a former statute unless it does so in perfectly clear terms; the words of the Ordinance are not to be read as taking away rights outside the scope of its subject-matter.

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It is plain here that there could not be any objection under the Ordinance to the sale of this land and the division of the proceeds, and if the Fiji Court of Appeal are right the appellant's right to a sale is taken away by a side wind by a statute which really is not concerned at all with the division of money. "The legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares": Maxwell on Interpretation of Statutes, 10th ed., p. 81; and "a special statute does not derogate from a special statute without express words of abrogation": *Hawkins v. Gathercole*²—that is the principle on which reliance is placed in this case. The most recent statement of the principle is in *National Assistance Board v. Wilkinson*.³ It cannot be said that Ordinance No. 121 points unmistakably to the conclusion that the right of a tenant in common to a sale has been taken away. The Fiji Court of Appeal are wrong in saying that subdivision is the same as partition, and therefore are wrong in saying that no order for partition of the property could be made. The appellant's right to a sale instead of a partition existed under the Partition Act of 1868 immediately before the coming into force of Ordinance No. 121, and that right was not in terms or by necessary implication affected by the Ordinance. It was only after obtaining a decree for partition that the appellant could have made an application under the Ordinance for division.

Sir Frank Soskice Q.C., Dingle Foot and Biden Ashbrooke for the respondent. There cannot be a sale unless the words in section 4 of the Act of 1868, "a decree for partition might have been made," are satisfied. The history as to partition shows generally what is meant by it. It is stated in Challis's Real Property, 3rd ed., p. 375, that: "After judgment upon a writ of partition at common law, a writ was directed to the sheriff, ordering him to make the partition by the oath of 12 lawful men of the county." That was the first step. Then there were two statutes of Henry VIII—1539 (31 Hen. 8, c. 1) and 1540 (32 Hen. 8, c. 32)—which extended the right to a compulsory partition which obtained under the common law in the case of the

² (1855) 6 De G.M. & G. 1, 31.

³ [1952] 2 Q.B. 648, 658; [1952] 2 T.L.R. 11; [1952] 2 All E.R. 255.

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first statute to tenants in common and joint tenants of freehold interests, and in the case of the second statute to tenants in common and joint tenants of leasehold interests. There is a description of voluntary partition in Blackstone's Commentaries, 20th ed., Bk. 2, p. 357. A compulsory partition and a voluntary partition is a dividing of the land into two parts. Partition means dividing and nothing less; one does not begin to partition until one subdivides. The next step was in 1833, when by the Limitation of Actions and Suits relating to Real Property Act, 1833 (3 & 4 Will. 4, c. 27), s. 36, real and mixed actions were abolished after December 31, 1834. Then came the Partition Act, 1868. That Act was no doubt passed because of the inconvenience and difficulty resulting from the need to divide indistinguishable interests, and a power of sale was given, so that those indistinguishable interests could be made separate interests. But it is submitted that the division of the land is the essence of partition.

The position is correctly stated in the judgment of the Fiji Court of Appeal: "It is clear, under section 11 of that Ordinance [c. 121], that subdivision, which we hold for the purposes of this case to be the same as partition, cannot be granted by the Subdivision of Land Board in relation to the land the subject-matter of this appeal, except in the circumstances specified in the proviso to that section." To put the matter in a nutshell: if the appellant had gone to the board first, as the Ordinance provided that he was to do, and said "I have only a very small property here, will you give permission for it to be subdivided?", they would have said, "Yes," and then he could have gone to the court and asked for, and would have got, his sale. But he has put the cart before the horse; he has asked the court to do something which it had not yet jurisdiction to do. The Chief Justice had no jurisdiction to make the order which he did, the board not having then given approval to the division. A decree for partition which eventuates in nothing is a nullity; it cannot be said that the Chief Justice has made a decree for partition; he has provided some of the form wholly bereft of the substance. Again and again one comes back to the fundamental point in this case—what is partition? Division is instinct in the whole matter—it is the kernel of partition; from beginning to end one is constrained to the view that the concept of partition without division really reduces it to nothing but an empty shell. [Reference was made to *Pryor v. Pryor*,⁴ *In re Frith and Osborne*,⁵ and to

⁴ (1875) L.R. 19 Eq. 595, 597-8.⁵ (1876) 3 Ch.D. 618, 625-6.

Walker's Partition Acts, 1868-76, 2nd ed., p. 27, and appendix, pp. 86-7, 95, 100, 106-7, and Seton's Forms of Judgments and Orders, 7th ed., vol. 2, p. 1812.] If it is right that partition does involve some kind of division, then this appeal should fail, for any such division is subdivision within the meaning of the definition, and that is a thing which the court had no power to order in 1937 unless the terms of the Ordinance had been complied with. No order for sale could be made in this case.

A reply was not required.

Oct. 26. The judgment of their Lordships was delivered by LORD PORTER. The problem which their Lordships have to consider in the present case arises as a result of an Ordinance of the Protectorate of Fiji, numbered 121, and enacted in the year 1937. The Ordinance deals with the subdivision of land and is headed an "Ordinance to provide for the regulation and control "of subdivisions of land." It applies not to the whole of Fiji but only to portions specified or to be specified, and in the specified portions prevents subdivision without the prior approval of a body created for the purposes of the Ordinance, known as a Subdivision of Land Board, and referred to as "the board."

The exact terms of the relevant portion of the Ordinance must be set out later, but it may be stated at once that the fundamental question in issue is whether its provisions prevent the making of a decree of partition of certain categories of land or merely prevent the carrying out of the decree by prohibiting the material division of the land as a result of the decree.

The facts are not in controversy and have been set out in the judgment of the Chief Justice, whose words may be adopted *seriatim*.

[His Lordship stated the facts set out above, and continued:] A true appreciation of the meaning and effect of the Ordinance, in their Lordships' view, requires a short summary of the doctrine of partition as it existed and developed in England. Partition was of necessity a remedy required only in cases where there was concurrent ownership, i.e., in cases of (1) coparceny, (2) tenancy in common, (3) joint tenancy, and (4) tenancy by entireties. The last named has no bearing upon the matter in dispute and may be disregarded, but before the reign of Henry VIII, though all concurrent owners could agree to a partition by private arrangement between themselves, coparceners alone had a legal right to demand partition. By Acts of 1539 and 1540

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respectively the right to demand partition was conferred on joint tenants and tenants in common.

In the case of coparceners the remedy of partition was obtained by the issue of a writ de partitione facienda, and the statutes referred to extended the like remedy to joint tenants and tenants in common. In the two Acts mentioned above the writ is referred to as “de participatione facienda” by what is apparently a clerical error, but it is obviously the same writ. It was, however, so cumbersome and difficult a process that the Court of Chancery assumed jurisdiction and the writ itself was abolished in 1833.

Except for the right of partition the concurrent owners had no further remedy, and there were many cases in which a fair division of the property enjoined in a decree was a matter of supreme difficulty, amounting in certain instances almost to an impossibility. It is not necessary to multiply illustrations: it is, as their Lordships think, sufficient to refer to *Turner v. Morgan*,¹ decided in the year 1803. The result of that case may be succinctly stated as declaring that in a bill praying partition the court must decree partition however inconvenient and undesirable partition may be. Indeed, the Lord Chancellor in that case adjourned the hearing in order that the parties might come to terms whereby the one might sell and the other purchase, but in default of agreement found himself compelled to decree partition.

The legislature was somewhat tardy in devising a remedy for that state of affairs, but eventually, in 1868, the Partition Act was passed. Its material provisions are as follows:—

“3. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then, if it appears to the court that, by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions.

¹ (1803) 8 Ves. 143.

“ 4. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then, if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions.”

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Both these sections have some bearing on the point at issue, but section 4 is that which is strictly relevant inasmuch as the appellant owns one moiety or upwards in the property to which the suit relates.

What the law of Fiji was with relation to partition at the time of the passing of the English Act need not be considered, since in 1875 the Supreme Court Ordinance (c. 2) of Fiji was passed. It runs in the following terms:—

“ 35. The common law, the rules of equity and the statutes of general application which were in force in England at the date when the colony obtained a local legislature, that is to say, on the second day of January, 1875, shall be in force within the colony subject to the provisions of section 37 of this Ordinance.

“ 36. Such portions of the practice of the English courts as existed on the said second day of January, 1875, shall be in force in the colony subject to the provisions of section 37 of this Ordinance, and except so far as such practice may be inconsistent with any general rules of the Supreme Court relating to practice and procedure.

“ 37. All Imperial laws extended to the colony by this or any future Ordinance shall be in force therein so far only as the circumstances of the colony and its inhabitants and the limits of the colonial jurisdiction permit and subject to any existing or future Ordinances of the colonial legislature, . . .”

In these circumstances in England and in Fiji from the year 1875 to 1937 a concurrent owner in the position which the appellant holds could have demanded a sale of the property in which he was interested instead of being contented with a decree for partition. The question which their Lordships have to determine is whether that right has been taken from him in Fiji by Ordinance 121 of that year. Its material terms are as follows:—

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Section 3. "In this Ordinance, unless the context otherwise requires— . . . 'subdivide' means—(a) dividing a parcel of land for sale, conveyance, transfer, lease, sublease, mortgage, agreement, partition or other dealing or by procuring the issue of a certificate of title under the Land (Transfer and Registration) Ordinance in respect of any portion of land, or by parting with the possession of any part thereof or by depositing a plan of subdivision with the registrar of titles under the last-mentioned Ordinance; . . ."

Section 5 (as amended by Subdivision of Land (Amendment) Ordinance, No. 14 of 1946, s. 2): "Notwithstanding the provisions of any other law for the time being in force no land to which this Ordinance applies shall be subdivided without the prior approval of the board to be obtained in the manner hereinafter prescribed: Provided that it shall be lawful to subdivide such land without such approval if—(a) no part of the land is situated in any township designated by the Governor by proclamation or within three miles of the boundaries of a town or of a township designated as aforesaid; and (b) the land is subdivided in such a manner that no lot is less than five acres in area."

Section 6 (as amended by Subdivision of Land (Amendment) Ordinance, No. 14 of 1946, s. 3): "(1) A person who desires to subdivide land in a manner which requires the approval of the board as provided in section 5 shall submit an application in writing to the local authority of the area in which the land is situated."

Section 11 (as amended by Subdivision of Land (Amendment) Ordinance, No. 27 of 1948, s. 3): "The minimum area and street frontage of any lot in any subdivision made under this Ordinance shall be twenty-four perches and fifty feet respectively: Provided that in special circumstances the board shall have power to modify such minimum area or frontage but only in so far as may be necessary to enable the full utilization of land under subdivision."

The respondent points out, as is the fact, that under the Act of 1868 no order for sale is possible unless a decree for partition might have been made if the Act had not been passed, and contends that, as the Court of Appeal have held, partition and division are the same thing. Partition, they say, merely means division, and as the Ordinance by section 5 prohibits division it prevents a decree for partition being made inasmuch as no partition is permissible in Fiji unless and until an application has

been made to the local authority and that authority has granted permission for the division to be made.

If, indeed, the Fijian Ordinance on its true construction prohibits the making of a decree of partition, the respondent is clearly right, subject to one argument presented to their Lordships on behalf of the appellant. On his behalf it is maintained that section 4 of the Act of 1868, when it uses the words "where, if" this Act had not been passed, a decree for partition might have "been made," is dealing only with the situation as it existed before that date. If, it is said, such a decree might have been made before 1868, then a sale may or, in certain circumstances, must, be granted. It matters not that division or, indeed, partition may be prohibited at a later time. The only question is, could partition have been decreed before the Act of 1868 was passed. The wording is not "might be made," but "might have been made," and such an expression, it is contended, points to the position as it existed in 1868 and not to the state of the law at a later period. If it had been desired to prohibit the remedy of sale in lieu of partition it would, it is maintained, have been easy to do so in plain terms, but a mere prohibition of partition in the future would not have this result.

In the present instance their Lordships are not disposed to make a pronouncement upon the argument so presented since they are of opinion that a decision of the matter can be arrived at on another ground.

In their view "a decree for partition" and "division" or "subdivision" are two different matters. It will be observed that throughout the relevant sections of the Ordinance, save in one place, the word "partition" (much less "decree for partition") is never used. The Ordinance throughout speaks of subdivision, and its object appears to be to prevent the subdivision of land into such small portions as are uneconomical or undesirable. It was urged, however, that a decree for partition necessarily included an order for division, and if an order for division could not be made then a decree for partition was likewise impossible.

In support of this proposition reference was made to Seton's *Forms of Judgments and Orders*, 7th ed. (1912), vol. II, p. 1812, where a form of order for partition in chambers is set out. It is, in the example given, first ordered that a partition be made, and then as part of the same order that the land be divided into a number of parts, and it is contended that both parts of the order are essential elements in a decree for partition. Their

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Lordships are not persuaded that a decree for partition cannot be made unless an order for subdivision forms part of the decree.

In their opinion this view is supported both by the textbook writers and the cases to which they were referred in argument. In Challis on Real Property, 3rd ed. (1911), it is said on p. 375, dealing with partition: "After judgment upon a writ of partition "at the common law, a writ was directed to the sheriff, ordering "him to make the partition by the oath of 12 lawful men of the "county." This procedure seems to enjoin first the making of the decree and then, as a subsequent act, the division of the property. The authority relied on for Challis's statement is to be found in Coke upon Littleton, vol. II, s. 248, and is in the following terms: "And when judgment shall be given upon "this writ, the judgment shall be thus; that partition shall "be made between the parties, and that the sheriff in his proper "person shall go to the lands and tenements, etc., and that he "by the oath of 12 lawful men of his bailiwick, etc., shall make "partition between the parties, and that one part of the lands "and tenements shall be assigned to the plaintiff or to one of the "plaintiffs, and another part to another parcener, etc., not "making mention in the judgment of the eldest sister more than "of the youngest."

For the sake of clarity it is perhaps desirable to quote the note to sect. 248 by Coke which immediately follows the words of Littleton. It uses the following expressions: "The first judgment in a writ of partition, whereof Littleton here speaketh, "is quod partitio fiat inter partes praedictas de tenementis "praedictis, cum pertinentiis (sic), after which judgment. By "this etc. viz. tenements, etc., is implied, that a writ shall be "awarded to the sheriff, quod assumptis tecum 12 liberis et "legalibus hominibus de vicineto tuo, per quos rei veritas melius "sciri poterit, in propria persona tua accedas ad tenementa "praedicta cum pertinentibus, et ibidem per eorum sacramentum, in praesentia partium (3) praedictarum per te praemuniendarum si interesse voluerint, praedicta tenementa cum "pertinentibus per sacramentum bonorum et legalium hominum "praedictorum, habito respectu ad verum valorem earundem, in "duas partes aequales partiri et dividi, et unam partem partium "illarum etc."

But its contents are summed up later when it is said: "And "it is to be observed, that there be two judgments in a writ of "partition. Of the former Littleton speaketh in this place.

“ And when partition is made by the oath of 12 men, and assign-
 “ ment and allotment thereof, and so returned by the sheriff,
 “ then the latter judgment is, *ideo consideratum est*, quod
 “ *partitio prædicta firma et stabilis imperpetuum teneatur*, and
 “ this is the principal judgment. And of the other, before this
 “ be given, no writ of error doth lie.”

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In their Lordships' opinion the natural inference from these authorities is that a decree of partition might be made although a right to a division of the land did not follow its pronouncement without the further step leading to the later and principal judgment. But, indeed, the same result would be reached even if the second judgment followed the first in due course. In such circumstances an order for partition and division could be made, but the latter part of the order could not be carried out in Fiji owing to the terms of the Ordinance. It is, in their Lordships' view, not the making of the decree which is prohibited, but the subdivision of the land which would otherwise result from the making of the decree.

The argument on behalf of the appellant is, as their Lordships think, strengthened by a consideration of the grounds for the decision in *Pryor v. Pryor*.² The relevant features in that case are set out in the opening page, from which it appears that in May, 1864, the suit was instituted to obtain the partition of an estate at Lambeth. The usual partition decree was made, with the following addition, “ and any of the parties to be at liberty “ before the commission shall be issued to carry in proposals for “ a sale or a partition before the judge in chambers.” It is true that in that case it was held that the decree having been made before 1868 a sale could not be ordered without the consent of the whole of the parties, but it is plain that a sharp division is drawn between the decree and the carrying out of the division of the land under it. Indeed, the decree might have been carried out in one of two ways, either by dividing the property or by a sale by consent of all the parties, and if the latter course had been followed it could not be said, nor was it contended, that a partition decree had not been made.

Their Lordships' view is in no way altered by the fact that under section 11 of the Ordinance the land in question in the present instance could not, owing to its diminutive size, be divided save in exceptional circumstances, the question being not Could it be divided? but Could a decree for partition be made?

² (1875) L.R. 19 Eq. 595.

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Nor is the definition of "subdivide" in section 3 (a) inimical to this opinion. All that that definition means is that a division or subdivision takes place within the meaning of the Ordinance, if the land is in fact divided, whether it is divided for the purpose of sale or conveyance or transfer or lease or sublease or mortgage, making an agreement, partition or otherwise dealing with the property. But it is not divided merely because an order for partition is made: there is nothing to prohibit the making of such an order. What is forbidden is the carrying out of the order by actual partition unless and until the approval of the board, set up by the Ordinance, has been obtained.

It will be observed that in coming to their conclusion their Lordships have not considered it necessary to express any opinion on the contention presented to them that a statute is not to be taken as affecting a fundamental alteration in the general law unless it uses words pointing unmistakably to that conclusion. In their opinion it is unnecessary to reach a conclusion on such a contention inasmuch as on the true construction of the Ordinance all that is forbidden is the actual division of the land or the carrying out of a decree for partition without the consent of the board. The making of a decree is not prohibited, and as such a decree might have been made (though it could not be implemented by actual division of the property) a direction for sale of the property is permissible under the terms of the Act of 1868.

Their Lordships will accordingly humbly advise Her Majesty that the appeal be allowed and the judgment of the Chief Justice restored. The respondent must pay the costs of the hearing before the Court of Appeal in Fiji and before their Lordships' Board.

Appeal allowed.

Solicitors: *Hy. S. L. Polak & Co.; Barrow, Rogers & Nevill.*

GONDICALO HYPOLITO CONSTANCIO

NORONHA

APPELLANT;

AND

DAMJI DEVJI AND OTHERS

RESPONDENTS.

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ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Kenya—Landlord and Tenant—Claim to possession—Jurisdiction of Supreme Court—Statute—Repealing legislation—Pending action—Statute not retroactive—Interpretation and General Clauses Ordinance of Kenya (Laws of Kenya, 1948, c. 1), s. 13 (3)—Increase of Rent and Mortgage Interest (Restrictions) Ordinance, No. 12 of 1940—Increase of Rent (Restrictions) Ordinance, No. 22 of 1949, s. 35.

The provisions of the Interpretation and General Clauses Ordinance of Kenya, which by section 13 (3) provide, inter alia, that "where an Ordinance repeals any other enactment, then, unless the "contrary intention appears, the repeal shall not— . . . (e) affect "any . . . legal proceedings, . . . and any such . . . legal proceeding " . . . may be . . . continued . . . as if the repealing Ordinance had "not been made," are in accordance with the fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication.

Where the appellant brought an action for possession of premises in the Supreme Court of Kenya—which then had admittedly jurisdiction to entertain the action—pursuant to the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Ordinance, 1940, at a time before the Increase of Rent (Restrictions) Ordinance, 1949, which repealed the Ordinance of 1940 and conferred upon a Rent Control Board jurisdiction to try actions for possession, had been passed, the appellant's action, which was pending when the Ordinance of 1949 came into operation, was a "legal proceeding" within the meaning of section 13 (3) of the Interpretation Ordinance, and was unaffected by the Ordinance of 1949, which contained no section which purported to affect pending proceedings, and accordingly the Supreme Court had jurisdiction to entertain the action.

Order of the Court of Appeal for Eastern Africa (1951) 18 E.A.C.A. 54 reversed.

APPEAL (No. 24 of 1952) from an order of the Court of Appeal for Eastern Africa (June 22, 1951), allowing an appeal by the present respondents from an order of the Supreme Court of Kenya

* *Present*: EARL JOWITT, LORD OAKSEY, and SIR LIONEL LEACH.



J. C. (Connell Ag.J.) (December 12, 1950), whereby the respondents were ordered to give vacant possession to the appellant of certain premises belonging to him and situate in Nairobi and to pay mesne profits in respect of their wrongful occupation thereof.

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The action out of which this appeal arose was brought by the appellant on November 3, 1948, in the Supreme Court of Kenya pursuant to the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Ordinance, 1940, at a time before the Increase of Rent (Restriction) Ordinance, 1949, had been passed. Under the Ordinance of 1940 the Supreme Court of Kenya admittedly had jurisdiction to entertain the case. Section 35 of the Ordinance of 1949, whilst repealing the Ordinance of 1940, declared that the 1940 Ordinance continued in full force and effect until the commencement of the Ordinance of 1949. The latter Ordinance provided also for the establishment by the Governor of a Rent Control Board with jurisdiction to try actions for possession of premises within the Central Province of Kenya, in which area the premises in question were situate.

The East African Court of Appeal (Nihill P., Lockhart-Smith J.A. and Thacker J.) allowed the appeal on the ground that, although proceedings were properly commenced in the Supreme Court of Kenya, the effect of the coming into operation during the course of the proceedings of the Increase of Rent (Restrictions) Ordinance, 1949 (hereinafter called "the Ordinance of 1949"), was to deprive the said court of any further jurisdiction to hear the case, but it expressed no view as to the appeal on the merits.

The appellant appealed.

1953. Oct. 13, 14, 15. *Michael Albery* and *Sirimevan Amerasinghe* for the appellant.

R. E. Megarry for the respondents.

The following cases were referred to in argument: *Colonial Sugar Refining Co. Ltd. v. Irving*¹; *Goldsack v. Shore*²; *Nadan v. The King*³; *Williams v. Linnitt*⁴; *Jonas v. Rosenberg*⁵; *Skinner v. Geary*⁶; *Joslowitz v. Burstein*⁷; *Stovin v. Fairbrass*⁸;

¹ [1905] A.C. 369; 21 T.L.R. 513.

² [1950] 1 All E.R. 276.

³ [1926] A.C. 482; 42 T.L.R. 356.

⁴ [1951] 1 K.B. 565; 66 T.L.R. (Pt. 2) 712.

⁵ [1950] 2 K.B. 52; [1950] 1 All E.R. 296; 66 T.L.R. (Pt. 1) 309.

⁶ [1931] 2 K.B. 546; 47 T.L.R. 597.

⁷ [1948] 1 K.B. 408; [1948] 1 All E.R. 40.

⁸ (1919) 88 L.J.K.B. 1004.

*In re Trecothick Marsh*⁹; *Warne v. Beresford*¹⁰; *Remon v. City of London Real Property Co.*¹¹; *Moodie v. Hosegood*,¹² and *Kent v. La Communaute des Soeurs de Charite de la Providence*.¹³

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Nov. 16. The judgment of their Lordships was delivered by LORD OAKSEY, who stated the facts set out above and continued: In the argument before their Lordships' Board the merits of the case have not been gone into, but counsel for the appellant raised the following contentions: first, that the Ordinance of 1949 on its true construction did not deprive the Supreme Court of jurisdiction: second, that if it did, it was ultra vires of the Kenya legislature: third, that the Ordinance of 1949 was not retrospective and had no application to suits begun in the Supreme Court before the Ordinance of 1949 came into force: and fourth, that the action was not an action under the Ordinance but was a common law action for possession of the premises against trespassers.

Their Lordships are of opinion that the appeal can and ought to be disposed of upon the first and third contentions, namely, that the Ordinance of 1949 upon its true construction did not purport to deprive the Supreme Court of jurisdiction in actions then pending.

The other questions are questions of importance and difficulty which, in their Lordships' view, it is undesirable to decide in a case in which they are not strictly necessary to the decision.

By section 13 (3) of the Interpretation and General Clauses Ordinance, Kenya, cap. 1, it is provided: "(3) Where an Ordinance repeals any other enactment, then, unless the contrary intention appears, the repeal shall not— . . . (b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed; or (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or . . . (e) affect any investigation, legal proceedings, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding, or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment

⁹ (1905) 37 S.C.R. (Can.) 79.

¹⁰ (1837) 2 M. & W. 848.

¹¹ [1921] 1 K.B. 49; 36 T.L.R.

¹² [1952] A.C. 61; [1951] 2 All E.R. 582.

¹³ [1903] A.C. 220; 19 T.L.R. 345.

J. C. " may be imposed, as if the repealing Ordinance had not been
1953 " made."

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The provisions of this Ordinance are in accordance with the fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. (See Maxwell on Interpretation of Statutes, 10th ed., p. 213.)

In their Lordships' opinion the appellant's action was a legal proceeding within the meaning of this section, and is therefore unaffected by the Ordinance of 1949 unless a contrary intention appears therein, and no such contrary intention does appear.

The Ordinance of 1949 contains no section which purports to affect pending proceedings, and it is to be observed that there is no reason why it should, since the substantive provisions of both Ordinances are practically identical (compare section 8 of 1940 and section 16 of 1949).

In spite, therefore, of the able and exhaustive judgment of Lockhart-Smith J.A. in the Court of Appeal their Lordships are unable to agree that the Ordinance of 1949 had any reference to pending actions, and they are therefore of opinion that this appeal must be allowed.

Counsel for the respondents suggested that the case ought to be remitted to the Court of Appeal to pronounce upon the merits, which were decided in favour of the appellant by Connell Ag.J., but as counsel offered no grounds upon which he challenged the findings of the trial judge, and the suggestion of a remittal was not mentioned in the reasons in the respondents' case, their Lordships are unable to accede to it.

Their Lordships will therefore humbly advise Her Majesty that this appeal ought to be allowed and the judgment of the Supreme Court of Kenya of December 12, 1950, restored. The respondents must pay the costs here and below.

Solicitors: *T. L. Wilson & Co.; Herbert Oppenheimer, Nathan & Vandyk.*

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	AND	1953
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ON APPEAL FROM THE COURT OF APPEAL OF THE COLONY OF
SINGAPORE.

Singapore—Landlord and tenant—Subtenancy—Determination of head tenancy—Subtenant a “statutory tenant”—Entitled to remain in possession—Control of Rent Ordinance (No. 25 of 1947), ss. 2, 14 (1), 15, 16, 17.

The principle underlying the Control of Rent Ordinance, 1947, of the Colony of Singapore, is the protection of those who have obtained lawful possession of premises whether as tenants or subtenants. A subtenant of premises lawfully sublet to him, and against whom an action for possession was brought by the head landlord after the latter had by notice to quit determined the head tenancy, was a “tenant” within the meaning of section 16 (a) of the Ordinance, read in the light of the definitions in section 2, and was, therefore, a “statutory tenant” within section 16, and accordingly, as the case could not be brought within any of the exceptions covered by section 14 of the Ordinance justifying an order for possession, was entitled to the protection of the Ordinance and to remain in possession of the premises.

Judgment of the Court of Appeal of the Colony of Singapore affirmed.

APPEAL (No. 1 of 1953) from a judgment of the Court of Appeal of the Colony of Singapore (July 15, 1952) affirming a judgment of Rogers J. (March 8, 1952).

The question which arose in this appeal was whether by reason of the provisions of the Control of Rent Ordinance, 1947, a subtenant was entitled to remain in possession of premises lawfully let to him after the owner of the premises had by notice to quit determined the head tenancy.

The following facts, which were not in dispute, are taken from the judgment of the Judicial Committee. On June 2, 1950, the appellants purchased from a company called United Engineers Ltd. premises known as No. 7, Read Street, Singapore, which were then held by another company, Harper Gilfillan & Co. Ltd., under a monthly tenancy. Harper Gilfillan & Co. Ltd. had, as they were

* *Present*: EARL JOWITT, LORD OAKSEY, and SIR LIONEL LEACH.

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entitled to do, sublet the premises to the respondents. On July 8, 1950, the appellants served on Harper Gilfillan & Co. Ltd. a notice to quit to take effect on August 31, 1950. The respondents were given possession of the premises under their subtenancy on January 1, 1947, and had been in continuous possession ever since.

By a writ of summons dated September 13, 1950, the appellants commenced in the High Court of Singapore the action which has given rise to this appeal. As owners of the premises they claimed possession against the respondents, but they did not add Harper Gilfillan & Co. Ltd. as defendants. The action was defended on the ground that by reason of the provisions of the Rent Control Ordinance the respondents had become statutory tenants and therefore their possession was protected. The trial judge found for the respondents and his finding was upheld by the Court of Appeal.

For the purposes of deciding the question raised it was necessary to examine the definitions of "landlord," "tenancy" and "tenant" to be found in section 2 of the Ordinance, and to refer to sections 14 (1), 15, 16 and 17.

The definitions were as follows:

" 'Landlord' means the landlord of premises in respect of which a tenancy exists and includes the landlord of a statutory tenant and in the case of a subtenancy a tenant who sublets the premises or any part thereof;

" 'tenancy' means any lease, demise, letting or holding of premises whether in writing or otherwise, by virtue whereof the relationship of landlord and tenant is created, but does not include the letting or hiring of furnished rooms with board;

" 'tenant' means the tenant of premises in respect of which a tenancy exists and includes a statutory tenant and in the case of a subtenancy a subtenant to whom the premises or any part thereof is sublet."

Section 14 (1) opened with these words: "No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases, namely,—" Thirteen exceptions were then set out. None of them applied if the respondents were statutory tenants within the meaning of the Ordinance.

Section 15 contained these provisions:—

"(1) No judgment or order for recovery of possession shall be enforced as against the subtenants (if any) of the tenant of

“ the premises, where the tenant was not prohibited from sub-
 “ letting by the terms of his tenancy; and every such judgment or
 “ order shall declare whether it may be enforced as against such
 “ subtenants or not.

“ (2) Any subtenant against whom such judgment or order is
 “ not enforceable shall, if he remain in possession after notice of
 “ the judgment or order has been served on him, cease to be a
 “ subtenant of the tenant and become a statutory tenant of the
 “ landlord in respect of the premises comprised in his sub-
 “ tenancy.”

It was common ground that that section did not apply in this case as no judgment was obtained against Harper Gilfillan & Co. Ltd.

Section 16 read:—

“ The following persons are statutory tenants under this
 “ Ordinance, namely,—

“ (a) any tenant of premises who remains in possession thereof
 “ after the determination by any means of his tenancy and who
 “ cannot by reason of the provisions of this Ordinance be deprived
 “ of such possession by his landlord;

“ (b) any subtenant becoming a statutory tenant under and
 “ by virtue of the provisions of subsection (2) of section 15.”

Section 17 set out the terms under which a statutory tenant was deemed to hold the premises.

The trial judge (Rogers J.) held that the respondents were tenants within the meaning of the definition given by section 2 and were entitled to the protection of section 14 as the appellants were not able to bring their case within any of the exceptions therein set out. He held further that when the interest of Harper Gilfillan & Co. Ltd. ceased as from August 31, 1950, their lawful subtenants, the respondents, began to hold as tenants from the head landlords. The Court of Appeal (Murray-Aynsley C.J. Singapore, Matthew C.J. Federation of Malaya, and Brown J.) agreed with those conclusions.

1953. Oct. 12. *L. G. Scarman* and *Nigel Macassey* for the appellants.

Colin Duncan and *B. T. Neill* for the respondents.

Nov. 17. The judgment of their Lordships was delivered by *SIR LIONEL LEACH*, who stated the facts and statutory provisions

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set out above and continued: Before the Board the case for the appellants has been put in this way. The action was one at common law and therefore outside the Ordinance. Section 14 imposes restraint on the common law right, but deals only with premises comprised in a tenancy, and here the tenancy had ceased to exist, having been determined by the notice to quit served upon Harper Gilfillan & Co. Ltd. Section 16 does not help the respondents as the word "tenant" as used therein cannot be deemed to include a subtenant.

The principle underlying the Ordinance is the protection of those who have obtained lawful possession of premises whether as tenants or subtenants, and sections 14 and 16 must be read in the light of the definitions given in section 2. Harper Gilfillan & Co. Ltd. were as regards the respondents "landlords," and the respondents were their "tenants." The premises in suit were comprised in a "tenancy." Clearly the appellants cannot bring the case within any of the exceptions covered by section 14.

The case is governed by section 16 (a). It was conceded on behalf of the appellants that the word "tenant" would include a subtenant if this clause had stopped at the word "tenancy," but it was suggested that the words which follow, "and who" "cannot by reason of the provisions of this Ordinance be deprived" "of such possession by his landlord" indicate that a subtenant is excluded. Their Lordships cannot accept this interpretation. They consider that the additional words merely refer back to section 14, just as clause (b) refers back to section 15, and do not restrict the meaning of the words used in the first part of the clause. For these reasons their Lordships hold that the respondents are statutory tenants within the meaning of section 16 (a) and consequently their possession of the premises is protected.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants will bear the costs.

Solicitors: *Chalton Hubbard & Co.; Sydney Redfern & Co.*

NORMAN CLYDE OAKES APPELLANT;
 AND
 COMMISSIONER OF STAMP DUTIES OF NEW
 SOUTH WALES RESPONDENT.

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Dec. 3

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia (New South Wales)—Revenue—Estate duty—Gift—Reservation of benefit—Remuneration for managing trust property—Whether beneficial interest—Grazing property—Settlor and his children co-beneficiaries in equal shares—Children's shares used for their maintenance and education—New South Wales Stamp Duties Act, 1920–1940, s. 102 (2) (d)—Finance Act, 1940 (3 & 4 Geo. 6, c. 29), s. 43 (2) (a).

The testator, who owned a grazing property in New South Wales, executed a deed poll under which, as from July 1, 1924, he held the property upon trust for himself and his four children as tenants in common in equal shares. The deed gave him wide powers of management, and in particular provided that, in addition to reimbursing himself all expenses incurred in the administration of the trust, he was entitled to remuneration for all work done by him in managing the trust property, on which he resided with his family in his capacity as trustee and manager, in the same manner and as fully in all respects as if he were not a trustee thereof. The testator continued to manage the trust property until his death, receiving certain varying sums annually as remuneration, and after deducting those and other outgoings and expenses he divided the profits from the property into five equal shares, crediting one share to himself and one share to each of his children. The children's shares he applied during their minority for their maintenance and education, and paid them to the children when they came of age.

On the death of the testator in 1947 the question arose whether the value of the whole of the trust property, or only one-fifth thereof, was to be included in his estate for the purposes of death duty under section 102 (2) (d) of the New South Wales Stamp Duties Act, 1920–40 (which was not for the purposes of this case materially different from section 43 (2) (a) of the United Kingdom Finance Act, 1940), which provided that for the purposes of death duty the estate of a deceased person should be deemed to include “any property comprised in any gift made by the deceased at any “time, whether before or after the passing of this Act, of which “bona fide possession and enjoyment has not been assumed by the “donee immediately upon the gift and thenceforth retained to the “entire exclusion of the deceased, or of any benefit to him of

* *Present*: LORD PORTER, LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER, and LORD ASQUITH OF BISHOPSTONE.

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“ whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died ” :—

Held, first, that it is not sufficient to bring a case within the scope of the section to take the situation as a whole and find that the settlor has continued to enjoy substantial advantages which have some relation to the settled property; it is necessary to consider the nature and source of each of those advantages and determine whether or not it is a benefit of such a kind as to come within the scope of the section.

St. Aubyn v. Attorney-General [1952] A.C. 15; [1951] 2 All E.R. 473 considered.

Held, secondly, that the property being held in trust for the children, the testator's possession as trustee was their possession for the purpose of the exclusion of the property under the section, and it mattered not that the trustee was the donor himself—the donor was entirely excluded if he only held the property in a fiduciary capacity and dealt with it in accordance with his fiduciary duty; and that any advantage to the testator in the application of the children's income from the trust for their maintenance and education before they came of age was not at the expense of the children and did not impair or diminish the value of the gift to them or their enjoyment of it. Any such advantage was not a benefit to the testator within the meaning of the section; it neither encumbered the enjoyment of the gift nor arose by way of reservation out of that which was given and accordingly did not bring the case within the section.

Held, thirdly, that if a donor reserves to himself a beneficial interest in property and only gives to the donees such beneficial interests as remain after his own reserved interest has been satisfied, such reservation of a beneficial interest does not involve any benefit to the donor within the meaning of the section: *Commissioner for Stamp Duties of New South Wales v. Perpetual Trustee Co. Ltd.* [1943] A.C. 425, 445–6; [1943] 1 All E.R. 525. But the right of the testator to take remuneration for his services in managing the trust property (which was assumed to be appropriate and reasonable remuneration for any other manager) could not be regarded as a beneficial interest in the property. He had reserved power to take benefit out of, or at the expense of, interests which were given, for the remuneration came out of the trust property and diminished the amount available for division among the tenants in common for their enjoyment, and being clearly a benefit to the testator, was one which fell within the section, and death duty was accordingly payable on the whole of the trust estate.

Judgment of the High Court of Australia (1952) 85 C.L.R. 386 affirmed.

APPEAL (No. 36 of 1952), by special leave, from a judgment of the High Court of Australia (May 8, 1952) affirming by a majority a judgment of the Supreme Court of New South Wales (September 13, 1951).

The following facts are taken from the judgment of the Judicial Committee: The appellant was the executor under the will of the deceased, Leslie William Friend, who died in 1947, and the question at issue arose on a case stated under the New South Wales Stamp Duties Act, 1920-1940, and related to the incidence of death duty on the property held by the deceased as trustee under a trust deed made by him on September 1, 1924.

In 1924 the deceased owned a grazing property in New South Wales known as "Ellerston" and carried on the business of grazier there. At that time he had four children, all of whom were under 21 years of age. By deed poll dated September 1, 1924, he declared that as from July 1, 1924, he had held and thenceforth would hold the property and the rents, issues and profits thereof "upon the trusts and with and subject to the powers and provisions hereinafter expressed concerning the same, that is to say:—".

The first two clauses following thereupon were as follows:—

"1. Upon trust that I or other the trustee or trustees for the time being of these presents (hereinafter called the trustee) shall either retain and use the said lands or at the trustee's absolute discretion at any time or from time to time sell and convert into money the same or any part thereof and invest the proceeds of such sale and conversion upon such securities real or personal and whether authorized by law for the investment of trust funds or not (and with liberty from time to time to vary and transpose the investments) as the trustee shall in his uncontrolled discretion think fit. The said lands and proceeds of sale thereof and the securities upon which the same may from time to time be invested are hereinafter called 'the trust fund.'

"2. That the capital and income of the trust fund shall be held by the trustee upon trust for the said Leslie William Friend and his children Henry James Friend, Donald Stuart Friend, Terence Maxwell Friend, and Gwynneth Ailsa Friend as tenants in common in equal shares; and if and so often as any such child shall die under the age of twenty-five years and without leaving a child or children him or her surviving then as well as to the original share of the child so dying as to any share or shares which shall have accrued to him or her by virtue of this present limitation upon trust for the others of such children and the said Leslie William Friend as tenants in common in equal shares."

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Thereafter the deed of trust set out a number of powers and discretions conferred on the trustee, including wide powers of management and in particular powers: "4.—(h) To appropriate "and partition any real or personal property forming part of the "trust fund to or towards the share of any person or persons "therein under the trusts hereinbefore contained and for that "purpose to fix the value of such real or personal property so "appropriated as the trustee shall think fit and to charge any "share with such sums by way of equality of partition as he may "think fit and every such appropriation valuation and partition "shall be binding upon all persons interested in the trust fund "provided always that as regards any share of the said trust "fund not absolutely vested any such appropriation shall be "without prejudice to the exercise of any powers hereby "expressly or impliedly given to the trustee.

"(j) In addition to reimbursing himself all expenses incurred "by the trustee in the administration of the trust the trustee "shall be entitled to remuneration for all work done by him "in managing and controlling any property forming part of the "trust fund or carrying on the business of a grazier or pastoralist "or other business in the course of his administration of the said "fund in the same manner and as fully in all respects as if he "were not a trustee hereof.

"(k) To purchase notwithstanding that he is a trustee hereof "all or any property comprising the trust fund or any part "thereof by public auction or by private contract provided in the "latter case that the sale shall be conducted by Goldborough "Mort and Company Limited or be made at a price and upon "terms and conditions approved by that company or by a valuer "or other nominee appointed by the said company.

"(o) To convey appropriate or dedicate any part or parts of "the property comprising the trust fund for public or charitable "purposes either gratuitously or for such consideration as the "trustee may think proper to accept."

In 1928 the deceased as trustee sold "Ellerston" and invested the proceeds in another grazing property known as "Glendon" and in certain mortgages, and he continued to manage that trust property until his death. He fixed from time to time amounts to be received by himself as remuneration under clause 4 (j) quoted above. He received for each of the first six years £3,000 and thereafter smaller sums; for the last three years before his death he only received £100 per annum. After deducting those and other outgoings and expenses he divided the

profits from the trust properties into five equal shares, crediting one share to himself and one share to each of his children. As stated by the commissioner in the case stated: "The amounts "credited to each such child were paid or applied by the testator "for or towards the maintenance and education of such child or "were paid to the mother of such child for or towards his or her "maintenance and education or were paid to such child after he "or she had come of age." Before his death all his children had come of age and all but one had attained the age of 25.

The value of the trust properties at the date of the deceased's death was £71,900 9s. 7d. The Commissioner of Stamp Duties assessed the death duty payable in respect of that estate on the basis that the final balance of the deceased's estate included the whole value of the trust property. The appellant contended that there should have been included only one-fifth of the value of the trust property and required the commissioner to state a case for the opinion of the Supreme Court of New South Wales. A case was duly stated and set out as the question for the determination of the court: "(1) Should the whole of the property which was "at the date of the death of the testator subject to the trusts of "the said deed be included in his estate for the purposes of the "assessment and payment of death duty?"

The Supreme Court (Street C.J., Maxwell and Owen JJ.) answered "yes" to that question, and on appeal that decision was affirmed by the High Court of Australia (Dixon C.J., Williams and Fullagar JJ., Webb and Kitto JJ. dissenting).

The question at issue in this appeal depended entirely on the applicability to the facts of this case of the provisions of section 102 (2) (d) of the Stamp Duties Act, 1920-40. Those provisions, so far as material to this case, were as follows: "For the purposes "of the assessment and payment of death duty . . . the estate "of a deceased person shall be deemed to include and consist of "the following classes of property:— . . . (2) (d) Any property "comprised in any gift made by the deceased at any time, "whether before or after the passing of this Act, of which bona "fide possession and enjoyment has not been assumed by the "donee immediately upon the gift and thenceforth retained to "the entire exclusion of the deceased, or of any benefit to him of "whatsoever kind or in any way whatsoever whether enforceable "at law or in equity or not and whenever the deceased died."

1953. Oct. 5, 6, 7, 8, 12 and 13. *Sir Garfield Barwick Q.C.* (Australia) and *R. O. Wilberforce* for the appellant. The question

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is whether the donor took any benefit which was referable to or trenched upon the gift to the donees. The correct approach to the question is to consider what precisely was the subject-matter of the gift, and then to ascertain whether bona fide possession thereof was immediately assumed by the donees, and whether such possession was retained to the exclusion of the donor or of any benefit to him whatsoever—whether the benefits or any of them affected the possession and enjoyment of what was given: *Commissioner for Stamp Duties of New South Wales v. Perpetual Trustee Co. Ltd.*¹ Taking the trust deed as a whole, what was given to the beneficiaries consisted of equitable interests deriving their origin and their limitation from the trust deed itself. Ab initio and in their nature they were subject to certain limitations, but, such as they were, they were given outright to the beneficiaries and they entered forthwith with full enjoyment of them. The majority of the High Court of Australia in effect regarded the powers given to the trustee as reservations out of some larger interest which might have been, but which was not, given. The true view, it is submitted, is to treat the subject-matter of the gift as being the beneficial interests subject to the limitations imposed when the gift was made. With reference to the actual provisions of the trust deed, the fact that the settlor remained sole trustee and that the trustee had conferred upon him by the trust deed extensive powers, some of which may possibly have been beneficial powers, does not involve the consequence that a reservation was made out of or referable to the gift. Such powers were the creation of the settlor at the time when the gift was made just as were the beneficial interests conferred. If it be asked “how did the deceased come to be in enjoyment of what—ever benefits came to him under the deed, whether by reason of his being a trustee or otherwise?” the answer, in Lord Radcliffe’s words in *Attorney-General v. St. Aubyn*,² is: “Because “he decided to create them and to take them for himself.” The trust deed in effect amounted to a distribution of the previously concentrated interests in and powers over the property some of which were given and some of which were retained. As was said by Kitto J. in his judgment in the High Court in a passage which is adopted as part of this argument: “The donees had no voice “in deciding to what extent their interests should be subject to “rights, powers or privileges retained by the deceased. They

¹ [1943] A.C. 425; [1943] 1 All E.R. 525.

² [1952] A.C. 15, 48; [1951] 2 All E.R. 473.

"got interests which were limited ab initio by the terms of their creation; and the limits were such that the interests were inherently insusceptible of being so possessed and enjoyed as to preclude the deceased from deriving those benefits which in fact he derived." ³

The right of the donor to receive remuneration was merely such a right as would normally have been conferred upon any other managing trustee, and the remuneration could not, under the terms of the deed, be, and was not, fixed otherwise than by reference to the proper value of the services rendered. The right to remuneration was itself a beneficial right in the trustee, and the rights in the donees were subject to that beneficial right in the trustee to retain his remuneration. On the execution of the deed all the rights which the donees could enjoy were vested in them, and the possession of the correlative equitable interests was forthwith assumed. From the possession and enjoyment of those rights and interests the donor was then and thenceforward excluded. Because he took a benefit in the form of a right to remuneration out of the fund with respect to which the donees' limited interests were declared, it does not mean that he was not excluded from all benefit from the donees' possession and enjoyment of their rights and interests. The principle to be taken from *Munro v. Commissioner of Stamp Duties* ⁴ is that one looks to see in substance what the settlor was, and what he was not, parting with; and, secondly, that case is an illustration of how a settlor remained, to all outward intents and appearances, in precisely the same situation after the gift as he was in before. The sort of benefit contemplated is one which prevents the donees' enjoyment of what was given to them; it is not anything that the donor can enjoy currently with them. In this case the donees have never had the power to interfere with what the settlor did from the inception by his own deed poll; they at no time got a right to prevent the enjoyment by the trustee of the beneficial right to have remuneration. *Munro's case* ⁴ shows that what a settlor keeps back he does not give.

In re Cochrane ⁵ and *Earl Grey v. Attorney-General*, ⁶ which are foundational cases on this matter, are referred to sufficiently in the *Perpetual Trustee Company's case*, ⁷ in which, again, the principle is that what the settlor has reserved is not given. *St.*

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³ (1952) 85 C.L.R. 386, 422.

⁶ [1900] A.C. 124; 16 T.L.R. 202.

⁴ [1934] A.C. 61.

⁷ [1943] A.C. 425; [1943] 1 All

⁵ [1905] 2 I.R. 626; [1906] 2 I.R. E.R. 525.

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*Aubyn's case*⁸ is perhaps the most striking case in this connexion, and shows that the present appeal really comes down to the short point whether the settlor gave the whole equitable interest in the property and then took something out of that interest himself, or whether he merely gave something less than a mere beneficial interest in it, having already reserved for himself a part of the beneficial interest. The entire scheme here was that the settlor put this property under a trustee and gave a beneficial interest to the trustee to retain his remuneration, and subject thereto he gave the interests to the children. What the donees were given was not large enough to enable them to exclude the donor. As Kitto J. said in his judgment⁹: "The cases establish that benefits " which the deceased in fact enjoyed after the date of the gift " do not attract section 102 (2) (d), unless, having regard to " the nature and incidents of the property given, possession and " enjoyment of that property was capable of being so assumed " and retained by the donee as to deny those benefits to the " donor." [Reference was also made to *Attorney-General v. Worrall*.¹⁰] The right to remuneration was not something which trench upon the possession of that which was given; if it did, then as the right to remuneration was a provision subject to which the trust was created, the settlor at the moment of its creation kept back that thing which the respondent says would trench upon the possession.

The question whether the income belonged to the children because they had an interest in the property has arisen in tax cases: *Macfarlane v. Inland Revenue Commissioners*,¹¹ which followed *Murray v. Inland Revenue Commissioners*¹² and was apparently brought in Scotland on the view that *Baker v. Archer-Shee*¹³ had overruled *Murray's case*.¹⁴

With regard to other alleged benefits in the settlor, the first suggested benefit is the advantage to the settlor's one-fifth interest which he derived from the working of the freehold as one property. The answer to that is that it was not a case of four one-fifths being worked together; the legal estate in the land so vested in trustees was one freehold; and further, any advantage thus gained was equally gained by all, and was not enjoyed by any at the expense of any other, and so did not trench upon the children's interest. The Supreme Court of New South Wales was

⁸ [1952] A.C. 15; [1951] 2 All E.R. 473.

⁹ 85 C.L.R. 386, 417.

¹⁰ [1895] 1 Q.B. 99; 11 T.L.R. 48.

¹¹ 1929 S.C. 453; 14 T.C. 532.

¹² (1926) 11 T.C. 133.

¹³ [1927] A.C. 844; 43 T.L.R. 758.

¹⁴ 11 T.C. 133.

in error in holding that the owners of undivided shares necessarily receive a benefit by reason of the existence of other undivided shares; in any event the existence of such a benefit does not prevent full possession and enjoyment being assumed by the donee of each share. The next suggested benefit is the relief of the donor's legal and moral obligation to maintain his children which use of their money for that purpose is said to afford. The first answer is that the power to use the money was statutory, under section 43 of the Trustee Act, 1925, and he could only use their money to maintain them. It was a fiduciary power to be exercised in the child's interest with its own money, and was not a benefit to the trustee. If it were suggested that the use by the father of the children's money pursuant to the statutory power was a benefit to him, it might be said that the gift of the money in the first instance was a benefit to him, and that would be self-defeating. The shares of income credited to the beneficiaries were "possessed and enjoyed" by them none the less because they were applied towards their maintenance and education. The next alleged benefit is the residence of the trustee on the land vested in him. The answers are that the donor resided on the property as a trustee managing it; residence is essential for a trustee managing a grazing property; there is no suggestion that the trustee was in breach of trust; and there is no suggestion that the remuneration taken by the donor was inappropriate for a trustee residing on the managed property. Such residence as he had on the property must be assumed, in the absence of evidence to the contrary, to have been such as was required to enable him to carry out his fiduciary responsibilities, and there is no material on which it can be said that the residence was a benefit. The remaining suggested benefit is the ability of the settlor under the deed to purchase the trust property notwithstanding his trusteeship. Even assuming that there is a benefit derived from it, it does not in any way trench upon the trust fund or its possession. [*Way v. Commissioner of Stamp Duties (N.S.W.)*¹⁵ was also referred to.]

The donees under the trust deed assumed full possession and enjoyment of the interests given to them to the exclusion of the donor, and accordingly section 102 (2) (d) of the Stamp Duties Act has no application.

G. Wallace Q.C. (Australia), *Sir Frank Soskice Q.C.* and *E. B. Stamp* for the respondent. The true effect of the trust deed was

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¹⁵ (1949) 79 C.L.R. 477.

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to create an equitable tenancy in common between the deceased and his four children, whereunder the children did not immediately assume bona fide possession and enjoyment of their interests and thenceforth retain them to the entire exclusion of the deceased or of any benefit to him. In terms the trust deed relates to land and is a grant of an equitable tenancy in common, although it is right to say that the words "subject to" and the sub-paragraphs of clause 4 carve out some interest out of the fee simple. Immediately before the deed was executed the donor owned the whole fee simple, and after the execution he owned the whole legal estate. Therefore someone had the beneficial estate, and the only persons who had the beneficial estate were in terms the tenants in common in equal shares—the father and the children—and all that happened subsequently were merely administrative powers and discretions given to the trustee. With regard to the words "subject to" in the deed, see *Commissioner of Stamp Duties v. Owens*,¹⁶ and on the meaning of "power," *Ex parte Gilchrist*.¹⁷ The scheme of the deed is, first, to make a grant to himself and his children of the land as tenants in common in equal shares, and what he gave were tenancies to the children, vested, but subject to being divested, with gifts over and accruer to the others, including the settlor, if any child died under 25. The settlor got an absolute vested interest in his own undivided share, plus a right to join in the accruer clause. It is important to observe that there is no imperative trust for sale. Clause 4 contains powers and discretions, some of them being of a trust nature. Unfortunately for the settlor, he should not have made himself a trustee and given himself those powers, because some of them amount to benefit within the meaning of the section.

According to its scheme this deed does not come within *Munro's case*¹⁸ or the *Perpetual Trustee Co.'s case*¹⁹; it is difficult indeed for the appellant here to rely on the latter case; all that that case does is once and for all time to prevent anybody arguing that bare possession of a trustee is significant. [Reference was also made to *In re Cochrane*.²⁰] There is a vast difference between the type of possession in *Attorney-General of Alberta v. Cowan*²¹ and that in the present case. It was here not sufficient to take the case out of the section. *St. Aubyn's case*²² is not

¹⁶ [1953] Arg.L.R. 569, 572.

¹⁷ (1886) 17 Q.B.D. 521, 531.

¹⁸ [1934] A.C. 61.

¹⁹ [1943] A.C. 425; [1943] 1 All

²⁰ [1905] 2 I.R. 626.

²¹ [1926] 1 D.L.R. 29.

²² [1952] A.C. 15, 41–2; [1951] 2

E.R. 525.

one which in any way can be used against the respondent here; on the contrary, it fortifies by way of contrast the submissions which he makes. If the benefit does not have to be reserved out of the thing given, it would seem that that would not trench upon the enjoyment of the thing given: *Attorney-General v. Worrall*.²³ With regard to the *Archer-Shee* type of cases,²⁴ it is submitted as a preliminary that they are not very, if at all, relevant to the issue now before the Board; that there is a distinction between the nature of an interest taken by a beneficiary where there is an unascertained residue, and, on the other hand, where in a deed of settlement land is conveyed to trustees. Those cases do not really assist on the construction of this particular deed. In the second *Archer-Shee* case²⁵ Lord Buckmaster made it clear that the law of England is as set out by Lord Wrenbury in the first *Archer-Shee* case,²⁶ and there appears to be no reason why those principles should not be applied to trusts in Australia, and that is an answer to the use of that case made on behalf of the appellant here. [Reference was also made to *Corbett v. Inland Revenue Commissioners*²⁷ and *Nelson v. Adamson*.²⁸] For the appellant reference was also made to *Macfarlane's* case²⁹; that case, however, is not really applicable, and reliance is placed on the English law, and having regard to the terms of the trusts in *Macfarlane's* case²⁹ there is no reason to regard the case as in any way in conflict with the principles enunciated by Lord Wrenbury. *Lord Sudeley v. Attorney-General*³⁰ has no direct relevance in this case, but it is not uninteresting to note that that case is apparently in conflict with an earlier decision of the House of Lords, *Cooper v. Cooper*³¹; the latter case was not cited in *Lord Sudeley's* case³² or in the *Archer-Shee* case.³³ *Lord Sudeley's* case³⁴ was considered in *McCaughey v. Stamp Duties Commissioner*.³⁵ If *Lord Sudeley's* case³⁶ was correctly decided it does not prejudice the submission for the respondent here, in that it related to the position of beneficiaries and was not to be applied to the case where on the true construction of the deed in question the gift was of the income and not of residue.

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²³ [1895] 1 Q.B. 99, 104; 11 T.L.R. 48.

²⁴ [1927] A.C. 844; 43 T.L.R. 758.

²⁵ [1931] A.C. 212, 217; 47 T.L.R. 171, 173.

²⁶ [1927] A.C. 844, 866; 43 T.L.R. 758, 764.

²⁷ [1938] 1 K.B. 567, 581; 54 T.L.R. 279; [1937] 4 All E.R. 700.

²⁸ [1941] 2 K.B. 12, 15; [1941] 2 All E.R. 44.

²⁹ 14 T.C. 532; 1929 S.C. 453.

³⁰ [1897] A.C. 11; 13 T.L.R. 38.

³¹ (1874) L.R. 7 H.L. 53.

³² [1897] A.C. 11; 13 T.L.R. 38.

³³ [1927] A.C. 844; 43 T.L.R. 758.

³⁴ [1897] A.C. 11; 13 T.L.R. 38.

³⁵ (1945) 46 S.R., N.S.W. 192.

³⁶ [1897] A.C. 11; 13 T.L.R. 38.

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There were here benefits received by the settlor which trenched on the gifts given to the donees. The first benefit—not necessarily in order of importance—was the right to partition in clause 4 (h). The settlor had a right to partition his own share, and that trenched on his children's full enjoyment of possession. [Reference was made to *Greenwood v. Percy*.³⁷] With regard to the use of income for the support of his children, the deceased was under both a statutory and a moral obligation to maintain his own children, and it was thus very much to his benefit that he should use his own children's money for their support. Under the section he must not get a benefit of any kind, and it is not to the point that it is lawful. If what he did is not covered by section 102, then very wide words have obviously failed to carry out what was the intention of the legislature. It is a benefit which springs from the gift, it is directly connected with the gift, and the mere fact that in a technical sense the money was in the ownership of the children and not under his legal control does not matter, because he obtained the money in fact and used it to his advantage. If he did not get that benefit the children would have had the right to enjoy the money themselves; it is trenching upon them because it diminishes or prejudices their full enjoyment of it. Even if it is done under section 43 of the Trustee Act, 1925, it is just as much an infringing; it is done lawfully, but it is still diminishing their full enjoyment. The above argument is on the assumption that the respondent has to show trenchment, but it is submitted that the benefits do not as a matter of law have to trench on the enjoyment given.

The next benefit on which the respondent relies is the power of managing and remunerating what he did. The exercise of that power was indeed a benefit to him in that it was the actual taking of a remunerative job. After they came of age the donees had a vested interest in the property and had dominion over it, and could have jointly appointed their own manager; this power therefore impaired their dominion over the property. There was a cutting down—a taking away of something from—the thing given. It is the exercise of that power which gives the benefit. Next, it was a benefit to the deceased trenching on the interests of his children under the deed to have what was in effect a right of pre-emption over the trust property and each part thereof. The mere ability to buy was a benefit to him, and it impaired the full enjoyment of possession. Lastly, it was a benefit to the

³⁷ (1859) 26 Beav. 572, 574.

deceased trenching on the interest of his children to reside on the trust property. It is an inference from the stated case that he continued to graze his own sheep on the property after the execution of the deed. Because powers are of a fiduciary nature, that does not prevent them being a benefit to the settlor within the meaning of the section. Though very wide, many of the powers were such as would be given under section 81 of the Trustee Act.

The provisions of the deed and the manner of carrying them into effect adopted by the deceased represented a total indivisible situation whereunder the deceased retained all the benefits which ordinarily flow from the absolute ownership of a grazing property. It is the clear intention of the Act that property should not be withdrawn from the taxable estate of its owner by a gift unless the gift and exclusion of the owner from possession and enjoyment of the subject-matter of it for the rest of his life are immediate and absolute. The settlor here received a benefit even though it did not impair the thing given, and his conduct attracts the attention of the section.

Sir Frank Soskice Q.C., following. The settlor had a special possession, and qua manager he retained a type of possession such as is envisaged by the Act and which impaired the possession of the others. As a matter of actual physical fact, he was in possession such as entitled him to dominate over the possession which each of the tenants in common had, and the result of that was that he could not be said to be excluded from possession, and that he had a possession which trenched on the possession which each of the donees had.

Sir Garfield Barwick Q.C., in reply. The equitable tenancy in common could only be possessed and enjoyed through the trustee, and the donee could only enjoy the beneficial rights through the trustee with the powers he had. If the Board takes the view that it is enough to show that the trustee has taken a benefit irrespective of whether there was a detriment to the donee, that would be a simple way out of the case. But the way in which the case has been put is that it must be shown that a benefit has been taken at the expense of the donees. The only things which the respondent points to as intrusions which impair the enjoyment are the exercise of the powers in the deed. The existence of those powers does not preclude the donees from assuming immediately on the gift possession and enjoyment of the interests given. In reply to the argument that on the construction of the section there is no need to show that the benefit

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in question impaired the possession and enjoyment, the first answer is in the words of the section itself; and secondly, the two sections—the English and the New South Wales sections—differ only in the words which follow the word “benefit,” and in the *St. Aubyn* case³⁸ Lord Radcliffe was deciding in terms that the benefit must intrude upon the possession; that case cannot be distinguished because of the absence of the word “contract” in the New South Wales section.

It is from the possession and enjoyment that the donor and his benefit must be excluded. It was said for the respondent that the exercise of the statutory power for the benefit of the children was a benefit to the settlor. There is no material from which it can be shown that he was any better off. He may have given them a better education because they had money of their own; he may have maintained them at a better level than he would have done; but assuming it to be a benefit, that is not enough; it is only those benefits which diminish the possession and enjoyment which has already been assumed by the donee which come within the section. There must be a diminution of that which is possessed before the benefit is material: *St. Aubyn's* case³⁹; *Attorney-General v. Seccombe*⁴⁰; the *Perpetual Trustee Co.'s* case.⁴¹ If there was an independent trustee exercising the power of maintenance and he gave the children their own money, precisely the same argument must avail—that that is a benefit to the father; and assuming that it is, how does it impair the possession and enjoyment of the children's income? The suggested benefit is the expenditure on the children of their own money. The right is a fiduciary power; he cannot benefit himself at their expense; and secondly, the circumstance that the due exercise of the fiduciary power may produce a benefit is irrelevant. [Reference was made to *Way v. Commissioner of Stamp Duties (N.S.W.)*.⁴²]

As to the argument that the settlor as manager had a special possession, it is submitted that his possession was theirs. The *Lord Sudeley* case⁴³ and *Cooper's* case⁴⁴ have recently been considered in *In re Cunliffe-Owen*.⁴⁵ If a benefit there be to the settlor in the terms of the deed or in the performance of them, no such benefit (a) prevented the donees from possessing and

³⁸ [1952] A.C. 15, 46; [1951] 2 All E.R. 473.

³⁹ [1952] A.C. 47.

⁴⁰ [1911] 2 K.B. 688, 699.

⁴¹ [1943] A.C. 425, 436.

⁴² (1949) 79 C.L.R. 477, 492; [1952] A.C. 95, 107; [1951] 2 T.L.R. 1239.

⁴³ [1897] A.C. 11; 13 T.L.R. 38.

⁴⁴ L.R. 7 H.L. 53.

⁴⁵ [1953] Ch. 545; [1953] 3 W.L.R. 120; [1953] 2 All E.R. 196.

enjoying what the deed gave them, or (b) displaced the donees in any respect from that possession and enjoyment which they assumed on the execution of the deed.

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Dec. 3. The judgment of their Lordships was delivered by LORD REID, who stated the facts set out above and continued: The appellant admits that the value of one-fifth share of the whole trust property was properly included in the final balance of the deceased's estate, but contends that the value of four-fifths of that property, being the value of the shares of the four children, ought to be excluded from the final balance as being property comprised in a gift made by the deceased of which bona fide possession and enjoyment was immediately assumed by the children and thenceforth retained by them to the entire exclusion of the deceased or of any benefit to him. The respondent contends that there was not entire exclusion from the children's shares of the deceased or of benefit to him, and the respondent founds on several advantages to the deceased as being benefits within the meaning of the above section. He founds on the application of the children's income from the trust for the maintenance and education of the children as being of advantage to the deceased in that he was thereby relieved, at least in part, from his obligation to maintain his children. Then he founds on the deceased having had power to take, and having taken, remuneration as trustee in accordance with the provisions of the trust deed. He also founds on the provisions of clauses 4 (*h*) and (*k*) as conferring benefits on the deceased. And finally he founds on the deceased having resided with his family on the trust property as a further benefit. The case stated makes no reference to this residence, but it appears that this matter was raised in argument in the Supreme Court and it was admitted before their Lordships that the deceased had resided on the property in his capacity as trustee and manager. It appears to their Lordships that it may well be that the property could not have been properly managed unless the manager resided there and that there is nothing to show whether this residence was in itself an advantage to the deceased; moreover, it is not clear whether this residence went beyond the rights of the deceased as co-owner of the property. Their Lordships are therefore not prepared to regard this residence as being in itself a benefit to the deceased in any relevant sense.

In all but one respect section 102 (2) (*d*) corresponds with section 11 (1) of the United Kingdom Customs and Inland Revenue Act, 1889, and section 43 (2) (*a*) of the United Kingdom

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Finance Act, 1940. The only substantial difference between them is that section 102 brings in "any benefit to him of " whatsoever kind or in any way whatsoever whether enforce- " able at law or in equity or not "; whereas section 11 and section 43 only bring in " any benefit to him by contract or other- " wise." But that difference was not founded on in argument and is not material in this case. These sections have given rise to much litigation and British authorities have frequently been cited in Australian cases and vice versa. In *St. Aubyn v. Attorney-General*¹ the earlier cases, including the Australian cases, were fully considered. In their Lordships' judgment it is now clear that it is not sufficient to bring a case within the scope of these sections to take the situation as a whole and find that the settlor has continued to enjoy substantial advantages which have some relation to the settled property; it is necessary to consider the nature and source of each of these advantages and determine whether or not it is a benefit of such a kind as to come within the scope of the section.

Their Lordships will first consider whether the use of the income which accrued to the settlor's children from the settled estate was such as to bring the case within the section. If property comprised in a gift is to be excluded from the estate of the deceased donor the statute requires that bona fide possession and enjoyment of the property shall have been assumed and retained by the donee to the entire exclusion of the donor. If property is held in trust for the donee, then the trustee's possession is the donee's possession for this purpose, and it matters not that the trustee is the donor himself. The donor is entirely excluded if he only holds the property in a fiduciary capacity and deals with it in accordance with his fiduciary duty. But the statute requires not only exclusion of the donor but also exclusion of any benefit to him, and it was on that matter that the argument turned. It appears from the case that after the children came of age they received payment of their shares of the income; it is not said that that involved any benefit to the deceased. But before they came of age their shares of income were used to pay for their maintenance and education, and it was said that this afforded some relief to the deceased, who would otherwise have had to pay out of his own money. Two arguments were submitted. In the first place it was said that spending the children's money in this way was improper or at least disadvantageous to them, and that

¹ [1952] A.C. 15; [1951] 2 All E.R. 473.

this combination of advantage to the donor with disadvantage to the donee brought the case within the statute. Their Lordships do not find any sufficient basis in fact for this argument. There is nothing in the case from which it can be inferred that the deceased acted at all improperly in this matter. At least after 1925 this money could properly be spent on the children's maintenance under statutory powers if that was in the best interests of the children. In the absence of anything to indicate the contrary it must be taken that the deceased acted properly in so applying his children's income, that this was in the best interest of the children, and therefore the children must be held to have had full benefit and enjoyment of their money. The case might have been very different if it had appeared that the deceased had so spent his children's shares of the income from the trust not entirely in their interests but wholly or partly for his own benefit in order to relieve himself from the expense of maintaining his children.

Before their Lordships for the first time a further argument of this nature was submitted. It was said that there was no statutory power to spend this money on the children's maintenance until December, 1925, that it appeared from the case that the deceased had so spent his children's money before that date and that therefore at least to this extent the deceased had acted improperly and it could not be said that the children's money had been applied for their benefit. This argument fails because there is nothing in the case to show that any of the children's money was spent before December, 1925. No doubt there was ultimately spent income which accrued in respect of the period before that date; but the trust only operated as from July 1, 1924, and thereafter income had to be earned, accounts had to be made up, the children's shares had to be credited to them, and after that some time may have elapsed before the money was spent. Their Lordships are not prepared to assume that the money was spent before the date which is crucial for this argument.

Then it was said that even if the income which accrued to the children was properly spent for their maintenance and they are to be held to have had full benefit and enjoyment of it, yet there was also a benefit to the deceased because if it had not been available he would have had to spend more of his own money. The findings in the case are not very specific, but their Lordships will assume that there was some advantage to the deceased; but that advantage was not at the expense of the

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children and did not impair or diminish the value of the gift to them or their enjoyment of it. It is possible for a donee, in the full and unrestrained enjoyment of his gift to use or spend it in a way that happens to produce some advantage to the donor without there being any loss or disadvantage to the donee. But, in their Lordships' judgment, any such advantage is not a benefit within the meaning of the section. The point is not strictly covered by authority, but the contrary view would be difficult to reconcile with what was said in the House of Lords in *St. Aubyn's* case.¹

The facts in that case were complicated and it may be sufficient for present purposes to state that as the result of settlements, the formation of a company and certain transactions the settled property at the relevant date consisted of fifty thousand ordinary shares of the company and sums of £750,000 payable by instalments and £100,000 immediately payable by the company. By virtue of an overriding general power of appointment Lord St. Levan, who had a life interest, vested in himself absolutely the sums payable by the company and surrendered his life interest in the shares so that bona fide possession and enjoyment of them was immediately assumed by the persons next entitled. But it was argued that there was not entire exclusion of Lord St. Levan or of any benefit to him by contract or otherwise mainly because of the rights which he retained to receive money from the company. The Crown relied largely on *Attorney-General v. Worrall*,² and it is in the passages dealing with that case that their Lordships find most help on the question now under consideration. Lord Radcliffe explained the case thus³: "A father "had made a present to his son of a sum of about £24,000 "secured on mortgage and the son had bought in the equity of "redemption for a small sum; in return for his father's gift the "son had covenanted to pay him an annuity of £735 per annum "during his life. In effect the son was returning to the father "the income on the property given during the remainder of the "father's life. It seems to me reasonable enough for a court to "hold in those circumstances that the son had not obtained the "enjoyment of what was given free from a contractual benefit to "the father which encumbered the enjoyment of the very thing "that was given. To hold otherwise would have been to stop at "the mere form of the transaction." Then he added⁴: "But I

¹ [1952] A.C. 15; [1951] 2 All E.R. 473.

² [1895] 1 Q.B. 99; 11 T.L.R. 48.

³ [1952] A.C. 47.

⁴ Ibid. 48.

"think it a very mistaken form of reasoning to deduce from a decision that a benefit, to be within the mischief of the section, need not necessarily be by way of reservation out of the subject-matter of a gift the general proposition that all benefits are within the mischief of the section, whether they are by way of reservation out of the subject-matter of the gift or not."

And Lord Simonds said ⁵: "Whatever the words, which have appeared in a series of Acts, might have meant to your Lordships if the matter were *res integra*, it cannot in face of the decision in *Attorney-General v. Worrall* ⁶ be denied that it is possible for possession and enjoyment of property not to be retained by the donee to the entire exclusion of the donor or of any benefit to him by contract or otherwise, though the donor himself no longer has any sort of interest in it. But the words, and particularly the word 'exclusion,' are singularly inapt to cover a benefit which does not arise by way of reservation out of that which is given, and I am not disposed to travel further than I am constrained by authority along a line of interpretation which appears to me difficult to justify."

On the view of the facts of the case which their Lordships have felt bound to adopt, this alleged benefit neither encumbered the enjoyment of the gift nor arose by way of reservation out of that which was given, and their Lordships can find no good reason for holding that it brings this case within the statute.

For similar reasons their Lordships are not able to accept the ground of judgment of the Supreme Court of New South Wales to the effect that the linking together of the one-fifth beneficial interests of the donor and the donees resulted in a benefit or advantage to each share, and that this advantage to the donor brought the case within the section. Even if this linkage was of advantage to the deceased (of which there is no evidence) that advantage did not in any way impair the enjoyment of the gift by the donees or trench upon their rights.

The next advantage to the deceased was of quite a different character. The deceased, under the power which he reserved to himself under clause (4) (j) of the deed of trust, took considerable sums as remuneration for his services in managing the trust property. Their Lordships will assume that those sums were reasonable and no more than would have been appropriate remuneration for any other manager. But receiving those sums was clearly an advantage or benefit to the deceased, and the

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⁵ [1952] A.C. 25.

⁶ [1895] 1 Q.B. 99.

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question is whether it was a benefit of such a kind as to come within the section. If a donor reserves to himself a beneficial interest in property and only gives to the donees such beneficial interests as remain after his own reserved interest has been satisfied, it is now well established that such reservation of a beneficial interest does not involve any benefit to the donor within the meaning of the section. In *Commissioner for Stamp Duties, New South Wales v. Perpetual Trustee Co.*,⁷ Lord Russell of Killowen, delivering the judgment of the Board, having dealt with the earlier cases, and in particular *Earl Grey's* case,⁸ said in a passage cited with approval in *St. Aubyn's* case⁹:

“ ‘There is nothing laid down as law in that case which conflicts with the view that the entire exclusion of the donor from possession and enjoyment which is contemplated by section 11 (1) of the Act of 1889 [the forerunner of section 43 of the Finance Act, 1940] is entire exclusion from possession and enjoyment of the beneficial interest in property which has been given by the gift, and that possession and enjoyment by the donor of some beneficial interest therein which he has not included in the gift is not inconsistent with the entire exclusion from possession and enjoyment which the subsection requires.’ ”¹⁰

It follows that if the right to take remuneration could be regarded as a beneficial interest in the property reserved by the deceased when making the deed of trust, then his remuneration would not be a benefit within the scope of the section. But their Lordships cannot regard a right to take remuneration for managing property as a beneficial interest in the property. A trustee is not permitted to take remuneration for services performed by him unless he is authorized to do so: in this case the trustee was authorized to do so because the deceased provided in the deed of trust that he as trustee or the trustee for the time being should be entitled to remuneration as if he were not a trustee. If the deceased had resigned office and another trustee had taken his place it could hardly have been contended that this provision gave to the new trustee a beneficial interest in the trust property, and in their Lordships' judgment the deceased did not reserve to himself a beneficial interest in the property by inserting this provision in the deed of trust. Indeed, the terms of the deed of trust make it clear that the whole beneficial interest

⁷ [1943] A.C. 425.⁹ [1952] A.C. 15, 28.⁸ [1900] A.C. 124; 16 T.L.R. 202.¹⁰ [1943] A.C. 425, 445-6.

in the property passed to the deceased and his children in equal shares, so that the subject-matter of the gift to each child was one-fifth of the whole beneficial interest in the property. Clause 2 declared that the capital and interest of the trust fund should be held upon trust for the deceased and his first named children as tenants in common in equal shares, and neither the right of the trustee to take remuneration, nor any other right, power or discretion conferred on the trustee affected the position of the deceased or his children as tenants in common of the whole beneficial interest in the trust property. Any remuneration taken by the deceased or any other trustee must come out of the trust property and must therefore diminish the amount available for division among the tenants in common for their enjoyment.

But the appellant argued that the children had had all the possession and enjoyment to which they were entitled under the deed of trust: they could only possess through the trustee and subject to his rights and powers, and therefore the exercise of his rights by the trustee could not trench on or impair that possession. The appellant founded on another passage in the judgment of Lord Russell in the *Perpetual Trustee Co.* case,¹¹ when he referred to the donee being "put in such bona fide "beneficial possession and enjoyment of the property comprised "in the gift as the nature of the gift and the circumstances "permitted." It was said that in the present case the nature of the gift to the children and the circumstances never permitted the children to have any greater possession or enjoyment than in fact they had. But to understand what Lord Russell meant by those words it is necessary to quote the preceding passage¹²:

"In their opinion the property comprised in the gift was the "equitable interest in the eight hundred and fifty shares, which "was given by the settlor to his son. The disposition of that "interest was effected by the creation of a trust, i.e., by trans- "ferring the legal ownership of the shares to trustees, and "declaring such trusts in favour of the son as were co-extensive "with the gift which the settlor desired to give. The donee "was the recipient of the gift; whether the son alone was the "donee (as their Lordships think) or whether the son and the "body of trustees together constituted the donee, seems "immaterial. The trustees alone were not the donee. They "were in no sense the object of the settlor's bounty. Did the "donee assume bona fide possession and enjoyment immediately

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¹¹ [1943] A.C. 440.

¹² Ibid, 439.

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“ upon the gift? The linking of possession with enjoyment as a
“ composite object which has to be assumed by the donee
“ indicates that the possession and enjoyment contemplated is
“ beneficial possession and enjoyment by the object of the donor’s
“ bounty. This question therefore must be answered in the
“ affirmative, because the son was (through the medium of the
“ trustees) immediately put in such bona fide beneficial possession
“ and enjoyment of the property comprised in the gift as the
“ nature of the gift and the circumstances permitted.” Lord
Russell was there explaining in general terms how the section is
to be interpreted when the subject-matter of the gift is an equitable
interest. He was not dealing with a case like the present,
when the donor received money which, if he had not taken it,
would have gone to the donee under the terms of the gift. In
the *Perpetual Trustee Co.* case¹³ the settlor derived no actual
benefit from the shares or their dividends. He might have
exercised voting powers in respect of the shares, but did not do
so; and he was one of several trustees and they might have used
trust money for the maintenance of the son, but did not do so.
With the exception of some insurance premiums the whole income
was accumulated and the trust fund was paid to the son on his
majority. Their Lordships do not read the words on which the
appellant founds as modifying or intended to modify the later
passage in Lord Russell’s judgment which has been quoted above
and in which he only refers to reservation by the donor of a
beneficial interest in the property.

But, even if there is no authority to support it, the appellant’s
case requires further examination. The argument is clearly and
forcibly stated in the dissenting judgment of Kitto J. in the High
Court of Australia where he said¹⁴: “ If the property comprised
“ in the gift had consisted of four one-fifths of the fee simple of
“ the trust property (whether legal and equitable or only equitable),
“ and the donees, pursuant to a collateral agreement or
“ otherwise, had allowed the deceased to have the benefits which
“ in fact he enjoyed, the case would have fallen clearly enough
“ within section 102 (2) (d). But it seems to me that, in order
“ to hold that four-fifths of the fee simple was the property
“ comprised in the gift, one would have to construe the deed,
“ not as a whole, but as if it were divided into two sections,
“ effecting two quite distinct transactions; the first transaction
“ being a disposition in equity of aliquot parts of the fee simple,

¹³ [1943] A.C. 425.

¹⁴ (1952) 85 C.L.R. 421.

“ and the second transaction consisting of a set of provisions
 “ operating to exact from the disponees a power for the disponor
 “ to derogate from the possession and enjoyment which an
 “ undivided share of an equitable fee simple enables the owner of
 “ it to have and to keep to himself. I cannot construe the deed
 “ in that way. It was a deed poll, and the benefits which the
 “ deceased derived in accordance with its provisions were benefits
 “ which the donees neither permitted him to derive nor had any
 “ power to deny him. They were in this position of impotence,
 “ not by their own choice, but because the deceased, in exercise
 “ of his right to give exactly what interests he liked and withhold
 “ exactly what he liked, had chosen to give them interests so
 “ hedged about as not to enable them to exclude him from those
 “ benefits. It was for him, when framing his deed, to delimit
 “ the interests he was parting with; and he did delimit them,
 “ not by any one part of the deed considered by itself, but by the
 “ entirety of its provisions. The donees had no voice in deciding
 “ to what extent their interests should be subject to rights,
 “ powers or privileges retained by the deceased. They got
 “ interests which were limited ab initio, by the terms of their
 “ creation; and the limits were such that the interests were
 “ inherently insusceptible of being so possessed and enjoyed as
 “ to preclude the deceased from deriving those benefits which in
 “ fact he derived.”

It is true that the deceased did not exact from his children his power to take benefits and that the benefits which he took were benefits which they neither permitted him to derive nor had any power to deny him. But in their Lordships' judgment the question is not whether the donees permitted the donor to take benefits. It is whether the donor took benefit out of that which was given. If a benefit arises by way of reservation out of interests which were given then no doubt the donees' interests are inherently insusceptible of being so possessed and enjoyed as to preclude the donor from taking that benefit, but the section applies because there is not entire exclusion of the donor or of benefit to him from the interests comprised in the gift. The contrast is between reserving a beneficial interest and only giving such interests as remain on the one hand, and on the other hand reserving power to take benefit out of, or at the expense of, interests which are given, and for reasons already stated their Lordships are of opinion that the present case is within the latter class.

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Two other powers reserved by the deceased were also founded on as benefits—power to appropriate and partition the trust property under clause 4 (h), and power to purchase it under clause 4 (k). It may be that the deceased could legitimately have used those powers to his own advantage, but in fact he made no use of them at all. So, at most, there were here potential benefits. As their Lordships have already decided that taking remuneration was a benefit within the scope of the section, they find it unnecessary to deal with these other matters.

Their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *Stephenson, Harwood & Tatham; Light & Fulton.*

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MEGHJI LAKHAMSHI & BROTHERS . . . APPELLANTS;
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FURNITURE WORKSHOP . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

East Africa—Landlord and Tenant—Claim to possession—Application for order for partial ejectment—Jurisdiction of Rent Control Board—Increase of Rent (Restriction) Ordinance, No. 22 of 1949 (Kenya), s. 16 (1) (k).

Landlord and Tenant. Privy Council—Appeal—Competency—"Value"—Value of the property the determining factor—Eastern African (Appeal to Privy Council) Order in Council, 1951 (S.I. 1951, No. 609), art. 3 (a). "Value."

By section 16 of the Increase of Rent (Restriction) Ordinance, 1949, of Kenya: " (1) No order for the recovery of possession of " any premises to which this Ordinance applies, or for the ejectment " of a tenant therefrom, shall be made unless— . . (k) the land- " lord requires possession of the premises to enable the reconstruction " or rebuilding thereof to be carried out, in which case the Central " Board . . . may include in any ejectment order for such purpose " an order requiring the landlord to grant to the tenant a new " tenancy of the reconstructed or rebuilt premises or part thereof " on such terms as may be reasonably equivalent to the old tenancy, " and fixing a date for the completion of the new building and for

* *Present: LORD TUCKER, LORD KEITH OF AVONHOLM, and Mr. L. M. D. DE SILVA.*

"its occupation by the tenant and imposing such reasonable conditions as the Board may think necessary."

The above subsection is not so framed as to envisage or make provision for an order for partial ejection, and accordingly the Central Rent Control Board had no jurisdiction, on the application of the appellant landlords under section 16 (1) (k) of the Ordinance, to make an order for possession of a plot of land in Kenya which formed part only of the demised premises which were within the scope of the Ordinance and the tenancy of which had been determined.

Decision of the Court of Appeal for Eastern Africa affirmed, but on a different ground.

Article 3 (a) of the Eastern African (Appeal to Privy Council) Order in Council, 1951, provides that an appeal shall lie as of right from any final judgment of the Court of Appeal "where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the said value or upwards."

Under whichever limb of article 3 (a) of the Order in Council a case may fall, the "value" must be looked at from the point of view of the appellant. The present case fell within the latter part of the article which dealt with "some claim or question to or respecting property . . . of the said value or upwards," and on the true construction it was the value of the property, not the value of the claim or question, which was the determining factor. Looked at from the angle of the appellant landlords, the value of the property, vacant possession of which they were claiming, was correctly taken on a capital value basis, which exceeded £500, and therefore under the article an appeal lay as of right.

It did not necessarily follow that the result would have been the same if the respondent tenants had been appellants, and the Board did not intend to imply any doubt as to the correctness in this respect of the decisions of the Eastern African Court of Appeal in *Popatlal Padamshi v. Shah Meghji Hirji*, Civil Appeal No. 32 of 1951, and *Chogley v. Bains*, Civil Appeal No. 57 of 1952.

Macfarlane v. Leclaire (1862) 15 Moo.P.C. 181, *Allan v. Pratt* (1888) 13 App.Cas. 780, and *Lipshitz v. Valero* [1948] A.C. 1 considered.

APPEAL (No. 11 of 1953) from a judgment and decree of the Court of Appeal for Eastern Africa (March 18, 1952) which allowed an appeal and set aside a judgment and decree of the Supreme Court of Kenya (July 25 and September 10, 1951, respectively) which had remitted the case for further hearing by the Rent Control Board which had dismissed an application for an order of eviction (August 19, 1950).

Pursuant to an agreement in writing dated May 2, 1941, the respondents became tenants of the appellants of Plot No. 45/46,

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Thika Township, in the Central Province of Kenya, for a period of 12 months from May 1, 1941, to April 30, 1942, at a monthly rent of Shs. 180. The plot comprised a building or buildings containing two shops and five living-rooms and an open space measuring about 20 ft. by 40 ft., which open space was the subject-matter of the present proceedings. On the expiration of the tenancy the respondents continued in possession of the plot as statutory tenants protected from eviction by the provisions of the Increase of Rent (Restriction) Ordinance, 1949, or other similar provision for the time being in force.

By an application in writing dated May 2, 1950, and made pursuant to the Ordinance of 1949, the appellants applied to the Central Rent Control Board for an order under section 16 (1) (k) of the Ordinance evicting the respondents from the open space. The relevant provisions of the Ordinance of 1949 in force at the material date were as follows:—

Section 1 (2): “ This Ordinance shall apply to all premises, “ whether dwelling-houses or business premises, situate in any “ area in the Colony in which a Rent Control Board has been “ established, other than—

“ (a) premises of which the standard rent is in excess of “ ten thousand shillings per annum and of which the landlord “ shall, after the commencement of this Ordinance, have “ recovered vacant possession under the provisions of this “ Ordinance.”

Section 2 (1): “ In this Ordinance, unless the context other- “ wise requires—

“ ‘ business premises ’ means a building or part of a build- “ ing let for business, trade or professional purposes or for the “ public service and includes land within the curtilage of such “ building or part of a building and comprised in the letting.

“ ‘ dwelling-house ’ includes any house or part of a house “ or room let as a separate dwelling (whether or not such “ house part of a house or room is occupied by one or more “ tenants) . . .

“ ‘ premises ’ means premises to which this Ordinance is “ applied by subsection (2) of section 1 thereof.”

Section 16 (1): “ No order for the recovery of possession of “ any premises to which this Ordinance applies, or for the eject- “ ment of a tenant therefrom, shall be made unless:— . . .

“ (k) the landlord requires possession of the premises to “ enable the reconstruction or rebuilding thereof to be carried “ out, in which case the Central Board . . . may include in any

“ejectment order for such purpose an order requiring the landlord to grant to the tenant a new tenancy of the reconstructed or rebuilt premises or part thereof on such terms as may be reasonably equivalent to the old tenancy, and fixing a date for the completion of the new building and for its occupation by the tenant and imposing such reasonable conditions as the Board may think necessary . . .”

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In contrast with section 16, which dealt with ejectment orders, section 5 (1) provided:—“The Central Board . . . shall have power to do all things which it is required or empowered to do by or under the provisions of this Ordinance, and in particular shall have power— . . .

“(g) for the purpose of enabling additional buildings to be erected, to make orders permitting landlords to excise vacant land out of premises of which, but for the provisions of this Ordinance, the landlord could have recovered possession, where such a course is, in the opinion of the Central Board . . . desirable in the public interest”;

“(k) to impose conditions in any order made by the Central Board . . . under the provisions of this section.”

The appellants’ application to the Central Rent Control Board was dismissed on the ground that the board had no jurisdiction to make an order for partial ejectment, which was what the appellants were asking for.

On appeal to the Supreme Court (Campbell Ag.J.) it was held that the Rent Board had jurisdiction to make the order claimed and the case was remitted to the board for further consideration on the merits.

On appeal by the appellants to the Court of Appeal for Eastern Africa (Nihill P., Worley V.-P., and De Lestange J.) it was held that the Supreme Court had rightly decided that there was jurisdiction in the Rent Control Board to order possession of part of the premises but that the case should not have been remitted for further consideration since the application did not come within the ambit of section 16 (1) (k) of the Increase of Rent (Restriction) Ordinance (No. 22 of 1949) under which the claim had been made, since the landlords were not asking for possession for the purpose of reconstructing or rebuilding, and that the application should have been made under section 5 (1) (g) of the Ordinance.

The respondents contended by way of preliminary objection on the hearing of the present appeal that the value of the matter in dispute on the appeal was and had been at all material times

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1953. Dec. 1, 2, 8, 9. *Michael Albery* for the respondents. There is a preliminary objection to the competence of this appeal. The appellants, in support of their application for leave to appeal to the Privy Council, filed evidence to the effect that the value of the whole of the premises was £67,500, and that the value of the open space which is the subject-matter of this appeal was £800. No evidence was filed as to the effect on such value of the occupation of the respondents pursuant to a statutory tenancy. The Court of Appeal proceeded on the basis that because the capital value of the open space with vacant possession was more than £500, therefore the appellants were, by virtue of article 3 (a) of the Eastern African (Appeal to Privy Council) Order in Council, 1951, entitled to appeal as of right. That basis is wrong in law. The correct test to be applied under article 3 (a) is to ascertain how much it is worth to the appellants to succeed on the appeal disregarding questions of costs. Where the appellants are the owners of land subject to a statutory tenancy and are seeking possession thereof, it is necessary to deduct from the value of the land with vacant possession the value of the land subject to the statutory tenancy which the appellants will retain even if they lose. That view is supported by *Popatlal Padamshi v. Shah Meghji Hirji*,¹ *Chogley v. Bains*² and *Lipshitz v. Valero*,³ and if it is applied to the facts of this case the value to the appellants of the matter in dispute must be less than £500.

S. P. Khambatta Q.C., *T. B. W. Ramsay* and *Sirimevan Amerasinghe* for the appellants. The proper test, which is laid down by the Judicial Committee in *Macfarlane v. Leclaire*⁴ and in *Allan v. Pratt*⁵ and *Lipshitz v. Valero*,⁶ is that the judgment is to be looked at as it affects the interests of the party who is prejudiced by it and who seeks to relieve himself from it by appeal. In an application for leave to appeal by a tenant the value of the subject-matter would be the occupancy right of the tenant. In an application for leave to appeal by the landlord the value of the subject-matter would be the value to the landlord of the premises with vacant possession. In this case it would be

¹ Civil App. No. 32 of 1951.

² Civil App. No. 57 of 1952.

³ [1948] A.C. 1.

⁴ (1862) 15 Moo.P.C. 181.

⁵ (1888) 13 App.Cas. 780.

⁶ [1948] A.C. 1.

the value of the vacant plot freed from the statutory tenancy. The Court of Appeal have applied the proper test.

*[The Board ruled against the preliminary objection and the appeal proceeded on its merits.]

Khambatta Q.C. Before the Rent Board the respondents raised no plea of want of jurisdiction; they made no plea that the merits of the application brought the case within the ambit of section 5 (1) (g) of the Ordinance of 1949 and not within section 16 (1) (k). Without asking counsel for any further evidence or for any argument on the issue of their power to order ejectment from part only of the premises, the Rent Board gave a peremptory decision holding that they had no power to order a partial ejectment. The board did not consider the merits of the application under section 16. Having held that they had no jurisdiction under section 16 to order partial ejectment, the board suggested that the landlords should take steps under section 5 to excise vacant land. The procedure adopted by the board afforded no opportunity to counsel for the landlords to ask for an amendment of the pleadings to bring their case within section 5. The board's duty was to take cognizance of any infringement of the Ordinance and to adopt a procedure which did natural justice to the parties. The procedure adopted was far from doing natural justice in that it afforded no opportunity to counsel to address the court on the question of jurisdiction to order a partial ejectment or to ask for an amendment of the pleading. There can be no question of exercising any discretion to refuse an amendment of the pleading, as no amendment was suggested at any time. The exercise of discretion to allow an amendment of the pleading was never invoked.

It is common ground that there being no question of excision of "vacant land" simpliciter to enable the putting up of "addition buildings" thereon, section 5 (1) (g) had no application to the facts of this case. Even assuming, however, that that section did apply to the facts here, the order of the Supreme Court of Kenya remitting the case to the board was just and fair, and would do no injustice to either party. The judgment of the Court of Appeal setting aside the order of the Supreme Court is based on a misunderstanding of the procedure adopted by the Central Rent Board and mulcts the landlords in costs for no fault of their own. The important feature of the proceedings before the Rent Board which was overlooked by the Court of Appeal was that, if a case of an infringement of the Ordinance is made out, then it is within the cognizance of the Rent Board under section

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9 (3) of the Ordinance, and nothing shall preclude the board from taking cognizance of that infringement. The Supreme Court of Kenya has not overlooked that feature in its order remitting the case to the board.

Michael Albery for the respondents. The Central Rent Board were right in holding that they had no power under section 16 (1) (k) of the Ordinance of 1949 to make an order for possession of part only of the premises let to the respondents. By virtue of the provisions of sections 1 (2) and 2 (1) of the Ordinance the word "premises" in section 16 (1) must, unless the context otherwise requires, refer to the whole premises comprised in a letting. This construction is supported in paragraph (k) of section 16 (1) by the reference therein to "the old tenancy." It is further supported by reference to other paragraphs of section 16 (1), such as (d) and (i), where the context shows that the term "premises" is used to denote premises comprised in a letting considered as a whole, and does not mean any particular part of such premises which the landlord may seek to recover. The words "or any part thereof" cannot be implied after the words "the premises" in the first line of paragraph (k), since where the draftsman so intends he expressly uses this expression, as in the phrase "rebuilt premises or part thereof" later in the same paragraph.

The Court of Appeal were wrong in holding that the decision of the English Court of Appeal in *Salter v. Lask*⁷ was applicable to the facts of this case. That case merely decided that as a matter of general law a landlord upon the expiry of a tenancy may obtain possession of part only of the premises where he is himself in possession of the rest. The present appeal turns upon the true construction of section 16 (1) (k) of the Ordinance, which is not paralleled in the English Rent Acts and as to which no English authority can directly assist. The Central Rent Board reasonably exercised its discretion in refusing to allow the appellants to raise a fresh case under section 5 (1) (g).

Khambatta Q.C. replied.

1954. Jan. 13. The judgment of their Lordships was delivered by LORD TUCKER. On this appeal the respondents took a preliminary objection that no appeal lay as of right under article 3 (a) of the Eastern African (Appeal to Privy Council) Order in Council, 1951. The appeal is by the landlords against

⁷ [1924] 1 K.B. 754.

an order dismissing their application for possession of a plot of land at Thika, in Kenya, which had been let by them to the respondents together with an adjoining building, which premises were within the scope of the Kenya Increase of Rent (Restriction) Ordinance, No. 22 of 1949.

The article provides that an appeal shall lie as of right from any final judgment of the Court of Appeal "where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the said value or upwards."

Leave was granted by the Court of Appeal for Eastern Africa on affidavits to the effect that the capital value of the plot in question exceeded £500. The respondents contended that the true test is how much it is worth to the appellants to succeed in the appeal, and that this is to be measured by deducting from the value of the land with vacant possession its value to the owners subject to the statutory tenancy, and that as no evidence of this had been adduced there was no jurisdiction to fix the conditions on compliance with which the final order giving leave to appeal would issue.

It is quite possible that a case may fall in whole or in part within more than one limb of article 3 (a), and it will suffice for an appellant to show that it comes within any one. It was laid down by this Board in *Macfarlane v. Leclaire*¹ that "the value of the subject-matter in dispute," under corresponding legislation relating to Canadian appeals, must be determined by looking at the judgment as it affects the interests of the party who is prejudiced by it and who seeks to appeal. The same test was applied in *Allan v. Pratt*² to a case of an appeal from a judgment awarding damages for personal injuries, it being held that the value was the sum awarded and not the sum claimed. More recently in *Lipshitz v. Valero*³ it was held that, where a tenant appellant had been evicted from a plot of land valued at £50 on which he had constructed a building at a cost of £450, the true test was whether it was worth £500 to him that the Rent Restriction Ordinance should be held to give him protection against an order to vacate the land leaving on it a building which had cost him £450 to erect.

The first two of these cases were dealing only with the value of "the subject-matter in dispute," and it would appear that

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¹ (1862) 15 Moo.P.C. 181.² (1888) 13 App.Cas. 780.³ [1948] A.C. 1.

J. C. in the last case also it was the first limb of the article which was,
1954 primarily at any rate, under consideration.

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Their Lordships have no doubt that under whichever limb of the article any case may fall, the "value" must be looked at from the point of view of the appellant, with the result that an appeal may sometimes lie where the landlord is the appellant although there could be no appeal by the tenant, or vice versa.

Whatever the result might be in the present appeal if the words "where the matter in dispute on the appeal amounts to "or is of the value of £500 sterling or upwards" stood alone, their Lordships are of opinion that the case falls within the latter part of the article which deals with "some claim or question to "or respecting property . . . of the said value or upwards," and that on the true construction it is the value of the property, not the value of the claim or question, which is the determining factor. The presence of the word "indirectly" seems to require this construction. Looked at from the angle of the landlords, the value of the property, vacant possession of which they were claiming, was correctly taken on a capital value basis. It by no means necessarily follows that the result would have been the same if the tenants had been appellants, and their Lordships do not intend to imply any doubt as to the correctness in this respect of the recent decisions of the Court of Appeal for Eastern Africa in *Popatlal Padamshi v. Shah Meghji Hirji*⁴ and *Chogley v. Bains*.⁵

Their Lordships have read a transcript of the shorthand note of the proceedings before this Board on the occasion of the application for leave to appeal in *Africa Boot Co. v. Morley* (where, however, the respondent was not represented) from which it would appear that article 3 (a) must have been construed in the sense indicated above.

Their Lordships were accordingly of opinion that the preliminary objection failed and proceeded to hear the case on its merits.

The appellants were desirous of erecting shops on land adjoining the demised premises and for this purpose they desired to obtain possession of a plot of land 20 ft. by 40 ft. in area which formed part of the premises demised to the respondents and which adjoined the building occupied by them and constituted the remainder of the demised premises.

The appellants accordingly gave notice to the respondents to

⁴ Civil App. No. 32 of 1951.

⁵ Civil App. No. 57 of 1952.

quit the demised premises and made an application to the Central Rent Control Board which was in form an application for possession of the whole of the demised premises. The application was made under section 16 (1) (k) of the Ordinance. It is clear, however, that on the hearing of the application the landlords were asking for an order for possession of part only of the premises, *viz.*, the plot of land on which the respondents had erected a lean-to shed, the removal of which the appellants had required in 1947. The claim has been treated throughout in all the courts below and on this appeal as a claim for partial ejectment and their Lordships consider it must be so regarded.

[His Lordship stated the effect of the decisions of the courts below as set out above, and continued:] Before considering whether the Rent Control Board could or could not have made an order for possession of part of the demised premises under section 16 (1) (k) of the Ordinance it will be convenient to dispose of a subsidiary question which was strongly urged by counsel for the appellants. It was to the effect that assuming the application properly fell to be made under section (5) (1) (g) the Rent Control Board should have dealt with it under that section or should have given the appellants an opportunity of amending. Further or alternatively it was contended that the Court of Appeal should have remitted the case to the Rent Control Board for them to deal with under that section. The short answer to this point is that the Rent Control Board were never asked to give leave to amend, and in any event the grant or refusal of such leave is a matter of discretion with the exercise of which their Lordships would not interfere.

Turning now to the question of the Rent Control Board's refusal to order partial ejectment. The relevant provisions of Ordinance No. 22 of 1949 in force at the material date were as follows: [His Lordship stated the sections of the Ordinance as set out above, and continued:] Their Lordships do not find it necessary to inquire in what circumstances at common law or under this Ordinance the court or Rent Control Board may be able to make an order for partial ejectment. One such case in which it was held that such an order is possible in England is *Salter v. Lask*,⁶ but in that case the landlord was already in possession of the remainder of the premises and Atkin L.J.'s judgment was expressly limited to such a case.

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In the present case the only question is whether section 16 (1) (k) is so framed as to envisage or make provision for such an order.

An application for possession under section 16 presupposes that the contractual tenancy of the demised premises has been determined. It is not possible to determine it as to part and keep it in being as to the remainder. In the present case the tenancy of the entire demised premises had been determined. If an order for possession of the plot of land is made, what is the legal position of landlord and tenant with regard to the remainder which was included at one rent with the plot in the original demise? No provision is made for a reduction in the contractual rent proportionate to the part of which possession has been given. The contrast between " the old tenancy " and " the new tenancy " in the subsection, together with the words " or part thereof " in line 6 and their absence in line 1 all point to the conclusion that " the premises " possession of which is required " to enable the reconstruction or rebuilding thereof " to be carried out " are the demised premises and not some portion thereof selected by the landlord.

The provisions of section 5 (1) (g) are clearly designed to meet a case of this kind, although their Lordships are not to be taken as expressing any view as to the result of such proceedings on the facts of this case.

Having regard to the language of section 16 (1) (k) their Lordships are of opinion that the Central Rent Control Board rightly decided that it was not open to them to make an order for possession of the plot of land which formed a part only of the demised premises the tenancy of which had been determined, and that for this reason the appeal must be dismissed.

In these circumstances it is not necessary to express any concluded view on the ground upon which the Court of Appeal held that the application for possession could not succeed in any event. Their Lordships feel that a further investigation of the facts, including the circumstances regarding the shed erected by the respondents, might well lead to the same conclusion as that reached by the Court of Appeal, but they feel some doubt whether there was sufficient material for an appellate court to reach this conclusion in the absence of any investigation by the Rent Control Board directed to this aspect of the case.

Their Lordships will accordingly humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay

the respondents' costs before the Rent Control Board and in the Supreme Court and the Court of Appeal for Eastern Africa, and four-fifths of the respondents' costs of the present appeal.

Solicitors: *T. L. Wilson & Co.; Herbert Oppenheimer, Nathan & Vandyk.*

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AND

HAZEL MAY PEARSE AND OTHERS RESPONDENTS.

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[AND CROSS-APPEAL.]

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia (New South Wales)—Revenue—Death duty—Company shares—Basis of valuation—Discretion of commissioner—Subject to review by the court—Solicitor executor—Authorized by the will to be paid usual professional charges—"Gift"—Rate of duty—New South Wales Stamp Duties Act, 1920-40, ss. 124, 125, 127 (1) (c).

Revenue—Death duty. Solicitor—Executor—Remuneration—Legacy. Judicial Precedent—Australian courts—Decisions of Court of Appeal in England—Authority.

By section 125 of the New South Wales Stamp Duties Act, 1920-40, the Commissioner of Stamp Duties is empowered to ascertain the value of any property for the purposes of death duty by such means as he may think fit, but subsection (2) of that section provides that his assessment shall be subject to appeal under section 124 of the Act, and his powers have also, as regards company shares, to be read as subject to section 127 (1). Section 124 requires the commissioner, on the application of an administrator who is dissatisfied with an assessment to death duty, to state a case for the opinion of the Supreme Court, and contains provisions for ascertaining all the facts necessary to enable the question submitted to the court to be determined, and further provides that on the hearing of the case the court shall determine the question submitted and shall assess the duty chargeable. Section 127 (1) provides that: "(c) . . . the commissioner may in his discretion adopt as the value "of a share . . . in any company the shares of which . . . are not "listed on a stock exchange such sum as in the opinion of the

* *Present:* VISCOUNT SIMON, LORD REID, LORD RADCLIFFE, LORD ASQUITH OF BISHOPSTONE and LORD COHEN.

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"commissioner the holder of that share would have received in
"respect of that share in the event of the company being voluntarily
"wound up . . ."

The commissioner having rejected a valuation by executors of the ordinary shares which a testator had held in a company not listed on a stock exchange, and in the exercise of his discretion under section 127 (1) (c) adopted a higher rate per share as being in his opinion the sum which the holders of the shares would have received in a winding up, a case was stated at the request of the executors which, in substance, raised as the real contest the question whether the court had jurisdiction to substitute its own discretion for that of the commissioner as to the mode of valuation and the value to be adopted:—

Held, first, that the effect of the New South Wales Stamp Duties Act, read as a whole, is to leave the court with unfettered power of review of the conclusion reached by the commissioner. As section 124 confers such wide general powers of review both of fact and of law, and imposes on the court the definite obligation to assess the duty chargeable, it is impossible to extract from section 127 (1) (c) an exclusion from those powers of the right to question both the mode of valuation and the value adopted by the commissioner. Paragraph (c) contains no sufficient indication that there must be attributed to the legislature the capricious intention that the court should remain under the duty of deciding a dispute between the subject and the commissioner as to the value of the shares but should be handcuffed to the particular mode chosen by the commissioner.

The observations of the High Court of Australia in *Commissioner of Stamp Duties for Queensland v. Beak* (1931) 46 C.L.R. 585, at 597, so far as they related to discretion, were to be treated only as obiter.

Held, secondly, that duty was payable at the higher rate specified in the fourth column of the Seventh Schedule to the Act on a sum which was agreed as the amount of the legal costs which a solicitor who was a trustee of the will of the testator was entitled to charge against the testator's estate under a provision in the will authorizing him to be paid his usual professional charges. Such a provision conferred a gift on the solicitor executor under the will and enabled him to take out of the assets of the testator something which the law would not otherwise allow.

In re Brown [1918] W.N. 118 and *In re Thorley* [1891] 2 Ch. 613; 7 T.L.R. 479, "which have never been doubted in any judicial "decision," applied.

Judgment of the High Court of Australia (1951) 84 C.L.R. 490 affirmed.

APPEAL (No. 9 of 1953) and CROSS-APPEAL, by special leave, from a judgment of the High Court of Australia (July 27, 1951) affirming a judgment of the Supreme Court of New South Wales (October 30, 1950).

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The appeal and cross-appeal in this matter raised two questions in relation to the estate of Mr. Henry Bowen Aylmer Pearse (hereinafter called the testator) who died on February 19, 1946.

The question raised by the appeal was as to the proper basis of valuation for the purposes of the death duty payable under section 101 of the New South Wales Stamp Duties Act, 1920-1940 (hereinafter called the Act), of certain shares in Plashett Pastoral Co. Ltd. (hereinafter referred to as the company).

The question raised by the cross-appeal was whether the commissioner was entitled to levy the higher rate of death duty specified in the fourth column of the Seventh Schedule to the Act on the whole or any part of the sum of £250, being the agreed amount of the legal costs which the respondent Langley, a solicitor and a trustee of the will of the testator, was entitled to charge against the testator's estate under the provisions of clause 13 of his will.

It would be convenient in the first place to state the relevant provisions of the Act. Section 101D provided for the payment of a duty (therein called death duty) at the rate mentioned in the Seventh Schedule to the Act upon the final balance of the estate of every person dying after the commencement of the Stamp Duties (Amendment) Act, 1939.

The Seventh Schedule specified the rates of duty payable. They varied according to (a) the amount of the estate and (b) the degree of relationship to the deceased of the persons to whom the property passed under his will or upon intestacy. The latter variation was indicated in the headings to the four columns into which the schedule was divided. This case was only concerned with the first and fourth columns. So far as material the heading to the first column read "on so much of the final balance of the estate as consists of:—(a) property which passes under the will . . . to the widow or lineal issue of the deceased." The heading to the fourth column read as follows: "on so much of the final balance of the estate as consists of property not otherwise provided for in the first, second or third columns of this Schedule."

Section 105 provided by subsection (1) that the final balance of the estate of a deceased person should be computed as being the total value of his dutiable estate after making the authorized allowances in respect of his debts. Subsection (2) provided that where not expressly otherwise provided the value of the property

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included in his dutiable estate should be estimated at the date of his death.

Section 117 imposed on the legal personal representatives certain obligations as to supplying information to the Commissioner of Stamp Duties of the State of New South Wales to enable him to assess the duty payable.

Section 124, which was of great importance in determining the question raised by the appeal, dealt with the right of the legal personal representative to challenge the assessment made by the commissioner, and was, so far as material, in the following terms:—

“ Section 124 (1) . . . any administrator liable to the payment
“ of death duty, who is dissatisfied with the assessment of the
“ commissioner may, within thirty days after . . . notice of the
“ assessment has been given to the administrator . . . , and
“ on payment of duty in conformity with the assessment, and
“ of the sum of twenty pounds as security for costs, deliver to
“ the commissioner a notice in writing requiring him to state a
“ case for the opinion of the Supreme Court.

“ (2) The commissioner shall thereupon state and sign a case
“ accordingly, setting forth the facts before him on making the
“ assessment, the assessment made by him, and the question to
“ be decided, and shall deliver the case so signed to the person
“ by whom the same is required (hereinafter referred to as the
“ appellant).

“ (3) The appellant shall within seven days after receiving
“ the case cause the same to be set down for hearing before the
“ next sittings of the Full Court at which the same can be heard.

“ (4) On the hearing of the case the court shall determine the
“ question submitted, and shall assess the duty chargeable and
“ also decide the question of costs.

“ (5) If it is decided by the court that the assessment of the
“ commissioner is erroneous, any excess of duty paid in con-
“ formity with such erroneous assessment, together with any
“ fine paid in consequence thereof, and the sum paid as security
“ for costs shall be ordered by the court to be repaid to the
“ appellant.

“ (6) If it appears to the court that the facts necessary to
“ enable the questions submitted to be determined are not
“ sufficiently set forth in the case or that such facts are in
“ dispute, the court may direct all such inquiries to be made
“ or issues to be tried as it deems necessary in order to ascertain
“ such necessary facts, and, if it deems fit, may amend the case.

“ Any such inquiry may be made before a judge of the court
 “ or the master in equity and any such issue may be tried by
 “ any such judge or a judge of any district court sitting either
 “ with or without a jury as the court may direct.

“ (7) On the hearing of the case the court shall be at liberty
 “ to draw from the facts and documents stated in the case any
 “ inference whether of fact or law which might have been drawn
 “ therefrom if proved at a trial.”

Section 125 empowered the commissioner to ascertain the value of any property by such means as he might think fit, but subsection (2) provided that his assessment should be subject to appeal under section 124, and his powers must also, as regards shares, be read as subject to section 127 (1), which was in the following terms:—

“ Section 127. (1) (a) For the purposes of this Act, the
 “ valuation of shares in any company, whether incorporated in
 “ or out of New South Wales, shall be made upon the basis that
 “ the memorandum and articles of association or rules of the
 “ company satisfy the requirements prescribed by the committee
 “ or governing authority of the stock exchange at the place where
 “ the share register in which the shares being valued are regis-
 “ tered is, to enable that company to be placed on the current
 “ official list of such stock exchange at the relevant time.

“ (b) No provision in the memorandum or articles of associa-
 “ tion or rules of any company whereby or whereunder the value
 “ of the shares of a deceased or other member is to be determined
 “ shall be applicable in determining the value of the shares for
 “ the purposes of this Act.

“ (c) Notwithstanding anything contained in the foregoing
 “ provisions of this subsection the commissioner may in his
 “ discretion adopt as the value of a share of any class in any
 “ company the shares of which of that class are not listed on a
 “ stock exchange such sum as in the opinion of the commissioner
 “ the holder of that share would have received in respect of that
 “ share in the event of the company being voluntarily wound up
 “ on the date upon which the value of the share is to be
 “ ascertained for the purposes of this Act.”

The company was admittedly a company the shares in which were at the date of the testator's death not listed on a stock exchange, and its articles of association contained provisions which would have made it impossible for it to become listed. It was a family company in the sense that with the exception of one ordinary share held by the respondent Langley all the shares

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were held by the testator and his brother and sisters or by their respective husbands and children, but the testator did not hold a majority of the shares and neither he nor his executors could have forced a winding up against the wishes of the other shareholders. The testator had the right to be managing director and chairman for life and had certain powers of appointing directors. The business of the company appeared to have been the running of a station known as Plashett, and its assets consisted almost entirely of land and improvements thereon and livestock.

The ordinary shares in the company held by the testator were included by the executors in the inventory of assets which was filed pursuant to section 117 at the value of £2 6s 6d. per share, that figure being supported by a valuation supplied by a firm of chartered accountants, Messrs. Robertson Crane & Gibbons. That was based on the average of the net profits for the five years ended June 30, 1945, which, after deducting the preference dividend, left an average of £1,171 9s. 0d. That the accountants capitalised at 7 per cent. in order to arrive at the value of the shares.

The commissioner refused to accept that figure, and in exercise of his powers under section 127 (1) (c) adopted the sum of £7 16s. 10d. per share as being the sum which in the opinion of the commissioner the holders of the shares would have received in a winding up. He issued his notice of assessment on July 8, 1948.

The executors, being dissatisfied with the assessment, gave notice in writing on August 6, 1948, requiring him to state a case for the opinion of the Supreme Court of New South Wales. He did so on August 2, 1950, and included seven questions for the opinion of the court. In view of the course which the proceedings subsequently took it was sufficient to state the first and fifth questions:—

“(1) Whether in valuing the 2,986 ‘B’ ordinary shares in “the company the commissioner was justified in exercising the “discretion conferred upon him by section 127 (1) (c) of the “Stamp Duties Act, 1920–1940, to value such shares upon a “liquidation basis.”

“(5) Whether by reason of clause 13 of the testator’s will “duty at the rate set out in the fourth column of the seventh “schedule to the Act should be assessed on:

“(A) The full amount of £250; (B) such amount less office “overhead expenses; (c) the executor-solicitor’s share of such “full amount; (D) the executor-solicitor’s share of the full

“ amount less his proportion of overhead expenses, or (E) no part thereof.”

As the judges of the High Court pointed out, the exact meaning of the first question was not clear, but it was apparent from the judgments delivered in the Supreme Court that the real contest between the parties was whether the court had jurisdiction to substitute its own discretion for that of the commissioner as to the mode of valuation to be adopted. The Supreme Court (Street C.J., Maxwell and Owen JJ.) held that it had that jurisdiction, and the High Court (Dixon C.J., McTiernan, Williams, Webb and Fullagar JJ.) was unanimous in upholding that decision. On the question raised by the cross-appeal the Supreme Court held that duty at the higher rate was leviable on the whole sum of £250, and that decision also was upheld by the High Court, Dixon C.J. and Fullagar J. dissenting.

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1953. Oct. 27, 28, 30; Nov. 2. *G. Wallace Q.C.* (Australia), *Sir Frank Soskice Q.C.* and *E. B. Stamp* for the appellant. The real contest between the parties to which the first question in the case stated is directed is whether the court has jurisdiction to substitute its own discretion for that of the commissioner as to the mode of valuation to be adopted. The Board is concerned here only with that question of principle—the actual amount of duty involved is only a minor matter. An exercise by the commissioner of his discretion under section 127 (1) (c) of the Act is not open to review by the court on a case stated under section 124, in the sense that the court has no jurisdiction to substitute its own discretion for his unless it is established that he has exercised his discretion on wrong legal principles or male fide or so irrationally that in law it is no exercise of the discretion at all. To hold the contrary view would be in conflict with a line of cases of high authority: *Pioneer Laundry and Dry Cleaners Ltd. v. Minister of National Revenue*¹; *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.*²; *D. R. Fraser and Co. Ltd. v. Minister of National Revenue*³; *MacCormick v. Federal Commissioner of Taxation*⁴; *Denver Chemical Manufacturing Co. v. Commissioner of Taxation (N.S.W.)*⁵ and *Australasian Scale Co. Ltd. v. Commissioner of Taxes (Q.)*.⁶ Those cases are not distinguishable on any ground; in particular, the powers of review

¹ [1940] A.C. 127; 56 T.L.R. 12;
[1939] 4 All E.R. 254.

² [1947] A.C. 109.

³ [1949] A.C. 24.

⁴ (1945) 71 C.L.R. 283.

⁵ (1949) 79 C.L.R. 296.

⁶ (1935) 53 C.L.R. 534.

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given to the courts by the statutes which were in question in *MacCormick's case*⁷ and in *Wrights' Canadian Ropes Ltd.'s case*⁸ are at least as wide as those given to the court by section 124 of the New South Wales Stamp Duties Act. *Federal Commissioner of Taxation v. Sagar*⁹ was on a different footing, and is an illustration of the legislature in express terms permitting the appeal court to interfere.

Where an appeal is given in terms and it is expressly provided that on the hearing the court may make such orders as it thinks fit, that is wider in terms than procedure by way of case stated, where all that the court can do is to answer the questions submitted to it: *McCaughey v. Stamp Duties Commissioner*¹⁰; *Commissioner of Succession Duties (S.A.) v. Executor Trustee and Agency Co. of S.A.*¹¹; *Commissioner of Stamp Duties (N.S.W.) v. Pearse*.¹² There is here no appeal from the discretion in the sense that the court can examine whether the discretion was right or wrong, but there may be an appeal on the question whether there was a genuine exercise of the discretion at all. In the present case there was no reason to hold that the commissioner had exercised his discretion on wrong legal principles or male fide or irrationally. It is his discretion, and it is for the taxpayer to show that his discretion was not lawfully exercised; there was here no fact which could be deemed to make his exercise of the discretion unlawful. In fact, nowhere in their judgments did the High Court say or intend to say that the exercise of the discretion was capricious and no exercise at all, because they had already held as a matter of law that the point did not arise because they had their own complete discretion. The judicial discretion cases are on a somewhat different footing from the statutory discretion cases; the former appear to be treated as in a category of their own: *Evans v. Bartlam*.¹³ There is no great difference between the principles enunciated in *Charles Oseinton & Co. v. Johnston*¹⁴ and those which are contended for here. The commissioner was given a discretion; it is his discretion and not the court's; he can only be interfered with if for some reason it turns out that there was no real exercise of the discretion. In view of the fact that the court held that it had an unfettered right to exercise its own discretion one does

⁷ 71 C.L.R. 283.⁸ [1947] A.C. 109.⁹ (1946) 71 C.L.R. 421.¹⁰ (1945) 46 N.S.W.S.R. 192, 207-8.¹¹ (1947) 74 C.L.R. 358.¹² 84 C.L.R. 490, 500.¹³ [1937] A.C. 473, 478; 53 T.L.R. 689; [1937] 2 All E.R. 646.¹⁴ [1942] A.C. 130, 138; 57 T.L.R. 515; [1941] 2 All E.R. 245.

not get to the question whether the commissioner in fact exercised his discretion correctly.

*Commissioner of Stamp Duties for Queensland v. Beak*¹⁵ is not authority for the view that the court can substitute its discretion for that of the commissioner, for, in that case, neither the Supreme Court of Queensland nor the High Court of Australia even considered, far less dealt with, the method of valuation: they merely reviewed the actual valuation, which they were justified in doing because, in that case, the valuation appeared to have been made in an irrational manner. That case is clearly distinguishable; in any event it ought not, in the light of the great weight of authority cited above, to be held against the appellant here. If *Beak's* case¹⁵ is authority for the view that the court can substitute its discretion for that of the commissioner, then it ought to be overruled because it is contrary to the line of cases cited and as a matter of construction of sections 124 and 127 of the Stamp Duties Act is erroneous. The court had not an unfettered discretion. If it were intended that there should be a general power of re-assessing different words would have been used in section 124 and a different procedure would have been laid down. Examples of other discretions in this Act are to be found in a number of other sections of the Act; if section 124 is correctly interpreted by the courts below all those other discretions would be properly open to review in the same manner, and it is submitted that it was not so intended.

If, contrary to the appellant's contention, the court is entitled to substitute its discretion for his, it should in the present case have reached the same conclusion as he did, namely, that the 2,986 "B" ordinary shares should be valued on a liquidation basis. Not only was the commissioner not capricious in selecting that method, but his decision was the only proper decision on the facts.

On the general method of valuation of shares reference was made to Dymond's *Death Duties*, 11th ed., pp. 239-40, and to *Gold Coast Selection Trust Ltd. v. Humphrey (Inspector of Taxes)*¹⁶ and *McCathie v. Federal Commissioner of Taxation*.¹⁷ The authorities cited by the High Court of Australia in the present case in support of the view that it was not proper for the appellant to exercise his discretion under section 127 (1) (c) are not truly in point, because none of them was concerned with

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¹⁵ [1931] Q.S.R. 219; 46 C.L.R. 585.

¹⁶ [1948] A.C. 459, 471-2; 64 T.L.R. 457; [1948] 2 All E.R. 379.

¹⁷ (1944) 69 C.L.R. 1, 10.

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a statutory provision corresponding to section 127 (1) (c). The judgments of the courts below ought to be reversed.

Sir Garfield Barwick Q.C. (Australia) and *R. J. Parker* for the respondents. There are two matters now in issue. First, the question of the extent of the court's power on a case stated under section 124, and in particular whether the court in determining the value of shares in a non-listed company is bound to value them on a liquidation basis simply because the commissioner has chosen to do so. That is what the commissioner submits. Secondly,—which only arises if the first question is answered unfavourably to the respondents—whether the material in the case stated entitled the commissioner to exercise his powers under section 127 (1) (c). In connexion with the first question, the commissioner proceeded on the presence of the word “discretion” in section 127 (1) (c), and from its presence, and only from its presence, he argued that the same result should be obtained in this case as was obtained in the three Canadian cases and the two Australian cases on which he placed reliance. It is submitted that in this Act, with appellate provisions, the word does not add anything of moment or relevance. Of course, if there were no appeal provisions present, the presence of that word would be very significant. With regard to the above-mentioned Canadian and Australian cases, it is conceded immediately that if this were a case where the decision of a fact or situation was exclusively committed to the commissioner those cases would be very much in point. Secondly, it is submitted that, properly understood, there is no inconsistency between those five cases and *Beak's* case¹⁸ or the judgment in the present case. In their last analysis in matters of statutory construction the *Pioneer Laundry* case,¹⁹ *Wrights' Canadian Ropes Ltd.'s* case²⁰ and *Fraser's* case²¹ found that the decision of some matter had been exclusively committed to the individual; none the less there was an examination to see whether the duty or function had been duly, in the sense of validly, exercised. The two Australian cases, *MacCormick's* case²² and the *Denver* case,²³ are precisely to the same effect, and see also the *Scale* case.²⁴ The underlying principle in all those cases may be stated in this way: where a statute commits a question or matter to the exclusive decision of some person or authority, no court,

¹⁸ 46 C.L.R. 585.

¹⁹ [1940] A.C. 127.

²⁰ [1947] A.C. 109.

²¹ [1949] A.C. 24.

²² 71 C.L.R. 283.

²³ 79 C.L.R. 296.

²⁴ 53 C.L.R. 534.

even when exercising wide powers of appeal, may decide that question. The proviso to that, however, is this—and it flows from the cases cited for the appellant—that the court may examine the facts and circumstances to see that the duty to decide has been fulfilled; that is to say, to see that the person or authority has brought to the task an honest and properly instructed mind, and that there was material on which the decision could be made in the sense chosen by the person or authority.

On the proper construction of this statute nothing is committed to the exclusive decision of the commissioner, and, under the above-mentioned proviso, it is contended that there was no material on which he could rightly resort to the power under section 127 (1) (c). In connexion with the proviso reference may be made to *Fraser's* case,²⁵ where it was said: "There remains the question whether the Minister, in exercising his discretion . . . proceeded on just, reasonable and admissible grounds." A similar type of expression is to be found in the *Osenton* case.²⁶ One finds the decision of a question exclusively committed to a person sometimes by the use of the word "discretion," or by such words as "in his opinion," "as he thinks proper." In relation to this matter two questions remain to be asked: (1) what was committed to the decision of the commissioner? (2) was it committed to his exclusive decision? Those are both questions of construction, and the two elements which interact will be the construction of the grant of power and the construction of the appellate provisions. The extent of the appellate power will no doubt greatly assist to determine whether the question is exclusively committed to the commissioner or not. And *prima facie*, if there is unrestricted power to review, the question is not exclusively committed to the person primarily entrusted with its decision. If, on the right construction of this Act the decision is not exclusively committed to the commissioner, and it is submitted that it is not, then no further question arises. If, contrary to that submission, the matter is exclusively committed to the commissioner, there remains the question whether he has duly exercised the power.

With regard to the question of the appellate power, the basic question is whether the assessment is right. The court cannot merely affirm or vary the assessment; it is important to note that when the court has decided the question it *must* assess.

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²⁵ [1949] A.C. 24, 34.

²⁶ [1942] A.C. 130, 139.

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There is no limitation imposed on the court's power because of the method of transferring the matter—because it is a stated case. Questions of fact can be sent up on a stated case. Thus the valuation of any item included in the dutiable estate can be transferred to the court for its decision.

The discretion given to the commissioner by section 127 (1) (c) is no more than a liberty or permission given to him in the course of his administrative functions to value shares on a particular footing, and it was not intended thereby to bind the court in the performance of its judicial functions and duties when the matter was removed to its jurisdiction by means of a case stated under section 124. In terms section 127 (1) (c) enables the commissioner to adopt a sum as the value of a share; all that the section does is to permit him to put a figure into the balance, which final balance by the terms of section 124 is susceptible of dispute. The necessary result is that the insertion in the dutiable estate of the sum which he has adopted as the value is to throw it open to review. He concedes that the amount which the holder of that share would have received is reviewable, and therefore he concedes that the amount of that sum which has been inserted in the final balance for the purpose of assessment is reviewable; and that, it is submitted, is the end of this case. What the appellant does not concede is that the mode of valuation is reviewable.

[He was stopped.]

Wallace Q.C. in reply. Under section 127 (1) (c) the commissioner's opinion of the value of the share is also a matter for his discretion—there is a discretion to select both the mode of valuation and the actual value. On construction, section 127 (1) (c) means either that the commissioner has a discretion to select the value in fact which the shares would be worth on a winding-up basis, or the value which in his opinion they would fetch on such basis, but the basis is critical and a *sine qua non* for the exercise of the discretion. It is submitted that it means the former—that he can select the value which in fact the shares would fetch on that basis—which is in line with what the Queensland courts said in *Beak's* case,²⁷ and is also in line with what was held in *Nakkuda Ali v. Jayaratne*.²⁸ The commissioner is, however, indifferent which it means, because he is satisfied with the value being reviewable, as it was reviewed in *Beak's* case,²⁷

²⁷ [1931] Q.S.R. 219.

²⁸ [1951] A.C. 66; 66 T.L.R. (Pt. 2) 214.

but the all-important point is that there is no general power to review and to open the whole matter and value not on a winding-up basis but on some other basis.

Sir Garfield Barwick Q.C. The question on the cross-appeal arises in this way: this will contained a commonly found clause allowing executors who were professional men to charge their fees for professional work done for the trust. The commissioner said that by dint of that clause some part of the assets of the deceased passed to the solicitor trustee and therefore what passed to the widow and children was so much the less. The financial significance of that was that the rate of duty applied to the amount which the commissioner said passed to the solicitor was at a higher rate than that which would have applied to that same sum had it been treated as part of the estate passing to the widow. So in the long run this estate bore a larger sum of duty than it would otherwise have done merely because of the presence of the clause. [Reference was made to section 101D of, and the Seventh Schedule to, the Act.] It is submitted that under this will no property of the deceased passed to the solicitor. The deceased may have created a right, but it does not follow that any property of the deceased has passed. Negatively, it is submitted that nothing less passed to the widow because of the presence of clause 13. No asset of the deceased passes to an executor when he is allowed to charge fees.

The authorities fall into three groups. The first group, under section 15 of the Wills Act, 1837, was concerned with whether a solicitor who was also an executor with a right to charge fees was a competent attesting witness, and it was decided that he was not: *In re Barber*²⁹; *In re Pooley*.³⁰ Also in *In re Barber*²⁹ Chitty J. said that the sum for professional services was "in effect bounty on the part of the testatrix," and that it gave him "an interest, legacy, gift, or appointment" within the meaning of section 15 of the Wills Act, 1837. The second group of cases is where there has been a conditional legacy to a managing executor, conditional on his managing the property, and that was held liable to legal duty: *In re Thorley*.³¹ The third group is that which says that when an estate is deficient to meet creditors of the deceased the solicitor when executor could not compete with those creditors for the amount of his remuneration: *In re White*.³² There is also a more recent authority to the effect

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²⁹ (1886) 31 Ch.D. 665, 670.

³⁰ (1888) 40 Ch.D. 1.

³¹ [1891] 2 Ch. 613; 7 T.L.R. 479.

³² [1898] 1 Ch. 297.

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that in relation to taxation the remuneration of the executor is earned income: *Dale v. Inland Revenue Commissioners*.³³ The dissenting judgments of Dixon C.J. and Fullagar J. in the High Court on this matter contain the argument which is now relied on and adopted. In the present case the testator appointed the executor and by the instrument of appointment said that he could have remuneration; it was not "bounty" in any real sense of the word; he was not giving his executor anything. Nothing in reality is paid to the executor solicitor out of the assets of the deceased.

Wallace Q.C. The question really is whether the whole of the property passed to the widow, that is to say, whether the property out of which the £250 must come passed to her. If it did not, then it is submitted that the case automatically goes to one of the other columns, which can only be column 4. If the £250 comes to the solicitor, whether it is called "bounty" or "legacy," or whether he obtained it solely by reliance on the will, as he does here, then the case for bringing it under column 4 is satisfied. Whichever way one looks at it, the solicitor has a clear right under clause 13 to get the £250 out of the dutiable estate. In *In re Thorley*³⁴ it was said that the fact that he did work was not to the point. In the cases there are such phrases as "it is a gift under the will or nothing": *In re Barber*.³⁵ These cases have been followed in New South Wales for over half a century, and this is the first time that the question has been raised, and they have been approved of in the House of Lords, where all the Law Lords agreed that those cases did establish that such a payment was bounty or legacy: *Dale's case*.³⁶ It is difficult to see how that line of cases can be held to be wrongly decided at this stage and after so long a time. If *In re Brown*³⁷ was correctly decided it is a clear-cut decision that the payment was on the same footing as other legacies and is strongly persuasive. This money did not pass to the widow: the only money which passed to her under the residuary clause was after the payment of legacies.

Sir Frank Soskice Q.C. following on the cross-appeal. This was simply a gift of that amount which the solicitor trustee would have been entitled to earn if he had been entitled to earn

³³ [1953] 3 W.L.R. 448; [1953] 2 All E.R. 671.

³⁴ [1891] 2 Ch. 613.

³⁵ 31 Ch.D. 665.

³⁶ [1953] 3 W.L.R. 448.

³⁷ [1918] W.N. 118.

anything, recognizing that as a trustee he could not earn anything.

Sir Garfield Barwick Q.C. in reply on the cross-appeal. If the testator had chosen a trustee company as executor it would have had a right to charge and that which passed would have been diminished to that extent; the same principle should apply where he has appointed a person as executor who is a solicitor authorized by the will to charge. The right answer is that the widow still gets the whole estate. The solicitor's right to remuneration comes from the fact that he works.

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Dec. 9. The judgment of their Lordships was delivered by LORD COHEN, who stated the facts and statutory provisions set out above and continued: Special leave to appeal to this Board against the decision of the High Court on the first point was granted on September 4, 1952, on the terms that the costs in Australia remain as directed in Australia and that the respondents' costs as between solicitor and client both of the petition for such leave and of the appeal to Her Majesty in Council should be paid by the petitioner in any event. At that time no application was made by the respondents for leave to appeal against the judgment on the fifth question, which held duty to be payable on the said sum of £250, but a petition for such leave was presented shortly before the main appeal was due to be heard. It was not opposed by the appellant and the Board resolved humbly to advise Her Majesty that leave should be granted.

In the very exceptional circumstances of the case, to enable appeal and cross-appeal to be heard together the Board agreed to dispense with the lodging of further cases by the parties. This had the result that their Lordships did not have the advantage of seeing on this point the considered statement in writing of the reasons of the parties normally to be found in their respective cases.

The Supreme Court of New South Wales regarded the point raised by the main appeal as concluded by the observations of the High Court in *Commissioner of Stamp Duties for Queensland v. Beak*,¹ where similar provisions in a Queensland Act were under consideration and the following passage is to be found in the unanimous judgment of the court²:—"The contention of the "commissioner is that the appeal given by section 50 [of the

¹ (1931) 46 C.L.R. 585.

² Ibid. 597.

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“Queensland Act] does not extend to enabling the court to review
“the value adopted for shares by the commissioner in the exer-
“cise of the discretion conferred by the last paragraph in section
“47. . . . Clear words would be needed to withdraw from the
“general power of review given by section 50 a particular process
“in making up the assessment essential to the result. A
“reference to discretion and opinion is not enough for the
“purpose. The function of valuation is performed by means of
“discretion and opinion, and it is because as between the Crown
“and the subject a judgment of an officer of the revenue should
“not be conclusive that an appeal is given.”

The High Court regarded the matter as open, though they quoted the case above cited as authority for the proposition that clear words would be needed to withdraw from the general power of review given by section 124 a particular process in making up the assessment essential to the result. They had, however, no hesitation in coming to the same conclusion as the Supreme Court as to the effect of section 127 (1) (c).

Having reached the conclusion that the whole question of valuation was at large, both courts decided that the mode prescribed by section 127 (1) (c) was not the proper mode to apply. Their Lordships pause here to observe that they do not read the decisions of the courts as excluding all reference to the value of the assets of the company in arriving at the proper valuation of the shares, but merely as deciding that it was wrong to assess the value of the shares under section 127 (1) (c) by reference only to what the holder thereof might have received if the company went into liquidation on the date of the death of the testator.

Mr. Wallace, for the commissioner, began his argument, by disputing the finding of the Supreme Court that the case was concluded against his client by the decision of the High Court in *Beak's* case.¹ He pointed out that in that case the court was considering not the propriety of the exercise by the commissioner of his discretionary power to value shares in a company on the basis that the company went into winding up on the death of a testator, but the correctness of the valuation, no attack being made on the basis selected. Their Lordships agree with this criticism and will therefore treat the observations of the High Court in *Beak's* case¹ so far as they relate to discretion only as obiter.

¹ (1931) 46 C.L.R. 585.

The main submission of Mr. Wallace was that the decision of the High Court was contrary (a) to three decisions of this Board on Canadian Statutes and (b) to two decisions of the High Courts of Australia.

Before considering these decisions their Lordships would observe that no assistance can be derived from a consideration of those provisions of English law which provide for an appeal to the courts by way of case stated, for whether the appeal be from the special or general Commissioners of Income Tax under the Income Tax Acts, from an arbitrator under the Arbitration Act, or from magistrates under the Summary Jurisdiction Acts, the appeal is from persons exercising judicial functions who are required to find the facts and the appeal is confined to questions of law.

The decisions of this Board on which Mr. Wallace relied were *Pioneer Laundry and Dry Cleaners Ltd. v. Minister of National Revenue*,³ *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.*⁴ and *D. R. Fraser & Co. Ltd. v. Minister of National Revenue*.⁵

In the *Pioneer Laundry* case⁶ the court was asked to review the decision of the Minister under a section of the Canadian Income War Tax Act, (R.S.C. 1927, c. 97, s. 5) which provided that income should for the purposes of that Act be subject to a deduction of such amount as the Minister in his discretion might allow for depreciation. The Supreme Court of Canada had held that there was no power in the court to review the decision of the Minister. This Board dissented from that view but, to quote the language of Lord Thankerton who delivered the judgment of the Board, "the court would not interfere with the decision 'unless . . . ' it was manifestly against sound and fundamental 'principles.'"⁷

In the *Wrights' Canadian Ropes* case⁸ the question at issue arose under section 6 (2) of the same Act, entitling the Minister to "disallow any expense which he in his discretion may determine "to be in excess of what is reasonable or normal for the business "carried on by the taxpayer." Their Lordships in that case came to the conclusion that the reference to "discretion" meant no more than that the Minister was made the judge of what was reasonable or normal, but expressed their agreement with the

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³ [1940] A.C. 127; 56 T.L.R. 12;
[1939] 4 All E.R. 254.

⁴ [1947] A.C. 109.

⁵ [1949] A.C. 24.

⁶ [1940] A.C. 127.

⁷ Ibid. 136.

⁸ [1947] A.C. 109.

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views expressed by the Board in the *Pioneer Laundry* case⁹ as to the proper approach to be made by the court when reviewing the decision of the Minister.

In *Fraser's* case¹⁰ the question arose under section 5 (1) (a) of the Dominion Income War Tax Act, R.S.C. 1927, c. 97, as amended by a statute of 1940, and the principal question at issue was whether the Minister was authorized under that section to refuse to make any allowance for exhaustion of timber limits or only authorized to determine the amount of the allowance. The Board, affirming the judgment of the Supreme Court of Canada, decided that the Minister could refuse to make any allowance. Their Lordships are unable to find in the judgment in that case any relevant statement of general principle which assists them in the case now before the Board.

The decisions of the High Court of Australia relied on by Mr. Wallace were *MacCormick v. Federal Commissioner of Taxation*¹¹ and *Denver Chemical Manufacturing Company v. Commissioner of Taxation (N.S.W.)*¹²

The first of these cases arose under the Gift Duty Assessment Act, 1941-42, section 14 (i) (ii) of which provided that gift duty should not be payable in respect of any gift concerning which the commissioner was satisfied that certain conditions were fulfilled. Mr. Wallace relied on some observations of Latham C.J., where he said¹³ :—" This court has, in a series of cases involving " the interpretation of taxation statutes, held that certain matters " are to be determined by the exercise of a discretion by the " Commissioner of Taxation, or in accordance with an opinion " formed by him, and that upon an appeal the court cannot " substitute the discretion or opinion of the court for that of the " commissioner. But in those cases the court has also held that, " if it be shown that the discretion was exercised or the opinion " formed upon a wrong construction of the relevant statute, or " that the discretion exercised or the opinion formed was so " irrational as to be not a discretion or an opinion of the character " contemplated by the statute, an assessment should be set aside " and remitted to the commissioner for reconsideration in accordance with law." Dixon J. pointed out¹⁴ that in such cases the statute conferring the discretion usually provides for reconsideration on the merits by a Board of Review.

⁹ [1940] A.C. 127.

¹⁰ [1949] A.C. 24.

¹¹ (1945) 71 C.L.R. 283.

¹² (1949) 79 C.L.R. 296.

¹³ 71 C.L.R. 299.

¹⁴ Ibid. 307.

In *Denver's* case ¹⁵ the question arose under the Income Tax Management Acts of New South Wales. These statutes conferred on the taxpayer a right of appeal to a "Board of Appeal," and if he exercised it the Act enabled that board to substitute its decision for that of the commissioner. Their Lordships deciding that case held that the court could only interfere with the decision of the Board of Appeal if that board committed an error in law.

Their Lordships have carefully considered the judgments in the cases cited and the relevant provisions of the statutes there considered. These provisions seem to their Lordships so different from the provisions of the Stamp Duties Act (N.S.W.) that their Lordships are unable to regard the decisions in the cases cited as affording any assistance in the case now before the Board. They agree with the High Court that the decision in the present case must turn upon the proper construction of the relevant sections in the Stamp Duties Acts.

Their Lordships find themselves in complete agreement with the reasoning of the High Court on that problem as expressed in the following extracts from the judgment prepared by Williams J.¹⁶: "There can be no question that if the statute intends that "a discretion shall be exercised by a particular person and not "by the court, the jurisdiction of the court is confined to supervising its exercise so as to ensure that it is exercised according "to law. The statute in such a case makes the particular person "the sole judge of the existence or non-existence of the fact or "other matter upon which the right or liability of the subject "depends and the court is not at liberty to substitute its own "opinion for his. If section 127 (1) (c) of the Stamp Duties "Act means that the commissioner is to be the sole judge of the "appropriate method to adopt in valuing shares in a company "not listed on a stock exchange, then the court, in exercising "its powers under section 124, cannot interfere unless it can "be shown that the commissioner has acted in contravention of "some principle of law. For, to be effective, the discretion must "be exercised, in the words of Lord Macmillan, delivering the "judgment of the Privy Council in *D. R. Fraser & Co. Ltd. v. Minister of National Revenue*,¹⁷ 'bona fide, uninfluenced by "irrelevant considerations and not arbitrarily or illegally.'

"It was not contended for the commissioner that the court "was bound to accept the amount of the valuation arrived at on "the basis of paragraph (c). It was admitted that the notional

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¹⁵ 79 C.L.R. 296.¹⁶ 84 C.L.R. 517.¹⁷ [1949] A.C. 24, 36.

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“ sums attributed to the shares by the commissioner upon the
“ hypothetical winding up were fully examinable. Its hands
“ were tied only to the extent that it could be directed by the
“ commissioner to adopt the mode of valuation prescribed by
“ the paragraph. This attitude of counsel for the commissioner
“ seems somewhat inconsistent. The paragraph would seem to
“ protect the opinion of the commissioner as to the sums the
“ shares would realize on a liquidation to the same extent as his
“ discretion to adopt this mode of valuation. There is no half-
“ way house. Either each and every activity of the commis-
“ sioner under the paragraph is subject to complete judicial
“ review under section 124, or each and every activity can only
“ be reviewed to the same limited extent.

“ “ When the wide powers conferred upon the court by section
“ 124 are considered it is apparent, we think, that it was intended
“ to make the decision of the commissioner to adopt the para-
“ graph subject to complete judicial review. Section 124 con-
“ tains elaborate provisions for ascertaining all the facts necessary
“ to enable the questions submitted to be determined, and sub-
“ section (4) provides that on the hearing of the case the court
“ shall determine the questions submitted and shall assess the
“ duty chargeable and also decide the question of costs. Duty
“ is payable upon the final balance of the estate, and section 105
“ provides that the final balance of the estate of a deceased
“ person shall be computed as being the total value of his dutiable
“ estate after making such allowances as are thereafter autho-
“ rized in respect of the debts of the deceased. It also provides
“ that, save as in this Act expressly provided, the value of the
“ property included in his dutiable estate shall be estimated as
“ at the date of the death of the deceased. If the duty is imposed
“ upon the court of itself assessing the duty chargeable, it seems
“ to us necessarily to follow that the court must itself value the
“ property included in the dutiable estate. That does not mean
“ of course that the court must value every item. It is only
“ concerned with the items of value which are in dispute.”

Mr. Wallace submitted that the High Court had ignored the fact that the only appeal allowed was by way of case stated, and suggested that this implied a limitation on the powers of the court in dealing with the questions submitted, but their Lordships would observe that there appears to be no limit on the number or scope of the questions of law or fact which the dissatisfied legal personal representative can require to be raised.

Mr. Wallace also argued that the object of the section was to prevent evasion or undue limitation of the duty and that that object would be defeated if the commissioner's decision to proceed under section 127 (1) (c) was open to review. Their Lordships are unable to accept this contention.

Prior to 1924 shares in companies of a class not listed on a stock exchange were valued by analogy with shares in partnerships on the basis of the interest of the shareholders in the assets of the company, but in 1924 this provision was altered and a provision substantially in the form of subsection (1) (a) was introduced. In 1931 the present subsections (a) and (b) became law. Williams J. who, their Lordships were informed, had great experience of this class of case, states in his judgment that notwithstanding the alterations of the law in 1924 shares of companies not listed on the stock exchange had in rare instances been valued on the basis prescribed in paragraph (c), and he suggests that paragraph (c) was introduced to preclude the argument that this course was not permissible even in those cases where it was best calculated to arrive at a fair value of the shares. This explanation seems to their Lordships reasonable, but be that as it may, their Lordships agree with Williams J. that paragraph (c) contains no sufficient indication compelling the court to attribute to the legislature the capricious intention that the court should remain under the duty of deciding a dispute between the subjects and the commissioner as to the value of the shares but should be handcuffed to the particular mode chosen by the commissioner.

Before their Lordships Mr. Wallace somewhat faintly sought to resile from the admission made in the High Court and to contend that the court had only limited powers even to review the opinion of the commissioner as to value. Their Lordships are unable to accept this argument, since they agree with the High Court that as section 124 confers such wide general powers of review both of fact and of law and imposes on the court the definite obligation to assess the duty chargeable it is impossible to extract from section 127 (1) (c) an exclusion from these powers of the right to question both the mode of valuation and the value adopted by the commissioner.

Reading the provisions of the statute as a whole, their Lordships are forced to the conclusion that the intention of the statute was to leave the court with unfettered power of review of the conclusion reached by the commissioner. Apart from the considerations referred to by Williams J., there are one or two

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other matters to which their Lordships may usefully refer. Thus, the statute gives no right of appeal to a Board of Review or Board of Appeal, so that if the appellant's argument was well founded, it would mean that although the commissioner had not heard any evidence or conducted anything in the nature of a judicial inquiry, his decision would be final. Moreover, if the court directed inquiries as to fact under subsection (6) and those inquiries disclosed facts which made it obvious that the adoption of the basis of valuation provided for by paragraph (c) of subsection (1) of section 127 would not lead to the ascertainment of the real value of the share, it would none the less, if the argument of the appellant were to prevail, be powerless to rectify the matter.

The cross-appeal turns upon the proper meaning to be given to the Seventh Schedule of the Act. It is obvious that the provisions of this Schedule, which brings into the law as to death duty considerations which in England were relevant as regards legacy duty but have never been relevant as to estate duty, may give rise to difficulties, since the amount on which death duty is chargeable may include sums such as the amount of testamentary expenses, to which no beneficiary will ever become entitled. Their Lordships will, however, confine themselves to the exact question which they have now to determine, viz., whether the amount which the parties have agreed as being the amount which the respondent Langley has received, or will receive, under clause 13 of the will is assessable at the rate specified in the fourth column of that Schedule and not at the rate specified in the first column of that Schedule.

Their Lordships note that it is the practice of the Australian courts in questions of law and equity common to both countries to follow the decisions of the Court of Appeal in England where the decisions of the court of England appear to have settled the law. Their Lordships think that this practice is to the advantage of both systems of law since it will enable the courts of either country to refer to the decisions of the other country for guidance in any field of law or equity common to both countries.

In the present case the issue is whether the amount receivable by the respondent Langley under the authority to charge, retain and be paid his usual professional charges contained in clause 13 of the testator's will ought to be regarded as property not otherwise provided for in the first, second or third columns of the Seventh Schedule.

Their Lordships agree with the majority in the High Court that the decisions to which Williams J. refers, and in particular the decisions in *In re Thorley*¹⁸ and *In re Brown*,¹⁹ lead inevitably to the conclusion that such a provision as clause 13 confers a gift on the executor and enables him to take out of the assets of the testator something which the law would not otherwise allow. *In re Brown*¹⁹ is more directly in point than *In re Thorley*,²⁰ since in that case Eve J. held that the amount which the solicitor-trustee would receive under a charging clause was a legacy which in the event which happened of a deficiency of assets must abate rateably with other legacies. It was not a decision of the Court of Appeal, but their Lordships think that it follows inevitably from the reasoning in *In re Thorley*²⁰ and *In re Pooley*.²¹ Their Lordships are unable to accept the explanation of these decisions suggested by Dixon C.J. and Fullagar J., and agree with the observations of the majority that unless the High Court refused to follow the cases cited, the amount of £250 is property which falls within the fourth column of the Seventh Schedule of the Act. The decisions of the Court of Appeal in England are not, of course, binding on this Board, and the decisions now under consideration have been criticized in some of the textbooks. They have, however, never been doubted in any judicial decision, and they have been treated as good law for so long a period that their Lordships are not prepared to depart from the principles therein laid down. Sir Garfield Barwick, for the respondents, agreed that the expression "pass" in the first column to the Schedule had no technical meaning, and if that is so their Lordships are of opinion that the £250 in question is money to which the respondent Langley became entitled under the will and is not property passing under the will to the widow or lineal issue of the deceased.

Before parting with this part of the case their Lordships would observe that their task has been facilitated by the fact that the parties were able to agree the value of the benefit received or to be received by the respondent Langley at £250. No question was raised as to the benefit being a contingent legacy subject to a condition which had not been, and might never be, fulfilled. Their Lordships had not to determine the rate of duty which would be payable on such a legacy.

For these reasons their Lordships will humbly advise her Majesty that the appeal and cross-appeal be dismissed. It was

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¹⁸ [1891] 2 Ch. 613; 7 T.L.R. 479. ²⁰ [1891] 2 Ch. 613.¹⁹ [1918] W.N. 118.²¹ (1888) 40 Ch.D. 1.

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agreed between the parties that in view of what transpired when leave to appeal was granted the proper order as to costs in the event which has happened is that the respondents' costs of the appeal shall be taxed as between solicitor and client and shall be paid by the appellant, and that there shall be no order as to the costs of the cross-appeal.

Solicitors: *Light & Fulton; Burton, Yeates & Hart.*

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ASSOCIATION OF AUSTRALIA LD.

APPELLANT;

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COMMISSIONER OF TAXES OF THE

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RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Revenue—Estate duty—Partnership assets—Deceased's share—Inclusion of interest in goodwill—"Personal property"—Liability to duty—Remission back—Assessment—Notice of objection—Reasons—Value of goodwill—Agreement on record—Effect—Commonwealth Estate Duty Assessment Act, 1914-42, s. 8 (3) (b), (4) (e).

Revenue. Judicial Precedent—Australia—High Court—Whether bound by own decisions. "Personal property."

The principal asset of a testator was his interest in a partnership pursuant to a deed of partnership which, inter alia, conferred options on surviving partners to purchase the testator's share in the capital on his death, and further provided that "in computing the amount of purchase money payable on the exercise of any option no sum shall be added or taken into account for goodwill." After the testator's death in 1944 the partners who survived him duly exercised the options conferred on them and the purchase price was ascertained in accordance with the provisions of the deed, no sum being added or taken into account for goodwill. The executors of the testator's will, in their statement of the testator's estate, gave as the value of the testator's interest in the partnership the price at which, pursuant to the deed, they were obliged to sell it to the surviving partners. Thereafter the Commissioner of Taxes, apparently founding on *Trustees Executors & Agency Co. Ltd. v. Federal Commissioner of Taxation* (Milne's case) (1944) 69 C.L.R. 270, made an assessment which included the additional item "portion of goodwill" in the partnership, "£20,000," on the

* *Present*: LORD OAKSEY, LORD MORTON OF HENRYTON, LORD REID, LORD ASQUITH OF BISHOPSTONE, and LORD COHEN.

ground that within the meaning of section 8 (4) (e) of the Estate Duty Assessment Act the testator had a "beneficial interest in "property [the goodwill] . . . at the time of his decease, which "beneficial interest, by virtue of a settlement or agreement made "by him, passed or accrued on or after his decease to, or devolved "on or after his decease upon, any other person" and was "deemed "to be part of" his estate:—

Held, that the whole of the testator's interest in the partnership property, including goodwill, was assessable to duty as being "personal property" within section 8 (3) (b) of the Act, which provided that "for the purposes of this Act the estate of a deceased "person comprises . . . his personal property wherever situate . . . "if the deceased was, at the time of his death, domiciled in "Australia." Being so assessable, it necessarily followed that that interest could not be assessable under section 8 (4) (e), which was concerned only with property not actually assessable as part of the estate falling within section 8 (3) but which was to be deemed to form part of the estate.

Milne's case (supra) disapproved.

Dicta of Hamilton J. in *Attorney-General v. Boden* [1912] 1 K.B. 539, at 556, to the effect that where a partnership deed provided that no allowance for goodwill should be made to a partner or his estate on his death his interest in the goodwill did not pass on his death, dissented from. In such a case as that the deceased partner's interest in goodwill passes with his interest in the other assets to his legal personal representative, and the fact that its value is not to be taken into account in calculating the price receivable by the estate for his interest in the partnership is irrelevant.

Orders of the High Court and of the Full Court of the High Court set aside.

APPEAL (No. 25 of 1951), by special leave, from a judgment of the Full Court of the High Court of Australia (May 16, 1949) dismissing an appeal from a judgment of the court (March 8, 1949) which had dismissed an appeal against an assessment to federal estate duty (February 14, 1947).

A partnership deed contained a provision whereby on the death of a partner the partnership continued between the survivors, and options were given to purchase the capital of the deceased partner at a price to be computed according to a formula, but it was expressly provided that in computing the purchase price nothing was to be added or taken into account for goodwill. One partner, Frederick Charles Henry Thomas (hereinafter called "the deceased"), died during the subsistence of the partnership and the options were exercised. The present respondent, the Commissioner of Taxes of the Commonwealth of Australia, claimed that the value of the share of the deceased partner in the

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goodwill was liable to estate duty under the Commonwealth Estate Duty Assessment Act, 1914-42. He claimed that one ground of such liability to duty was that the deceased partner's share in the goodwill was a beneficial interest in property which the deceased partner had at his death and which by virtue of a settlement or agreement made by the deceased passed or accrued on or after his decease to, or devolved on or after his decease upon, some other person within the meaning of section 8 (4) (e) of the Act. On the other hand, the appellant, the executor of the deceased partner's will, contended that the interest of the deceased partner in goodwill was an interest ceasing on his death, that accordingly there was no passing, accruer or devolution, and that the deceased partner's share of the goodwill was not liable to duty under section 8 (4) (e) or otherwise.

A similar point was decided in favour of the respondent in *Trustees Executors & Agency Co. Ltd. v. Federal Commissioner of Taxation* (*Milne's case*),¹ which was a majority decision of the Full Court of the High Court of Australia.

In the present case *Williams J. and the Full Court* (Latham C.J., Rich, Dixon, McTiernan and Webb JJ.) held themselves bound by *Milne's case*,¹ so that the substantive point was not argued before the Full Court, whose judgment canvassed only, and answered adversely to the appellant, the question whether they should allow the point of law in *Milne's case*¹ to be re-argued.

The facts, the relevant terms of the partnership deed, and the statutory provisions appear from the judgment of the Judicial Committee.

1953. Dec. 7, 8. *Geoffrey Cross Q.C. and J. H. Stamp* for the appellant. This case is in effect an appeal from *Milne's case*.¹ There are certain minor and immaterial differences in the partnership deeds in the two cases, but in both cases it was provided in the deed, inter alia, that on the death of the deceased the other partners should take over his interest in the partnership at a value based on balance sheet figures, which did not include any sum in respect of goodwill. In the present case the purchase price, fixed at £156,217 11s. 3d., has been treated as part of the estate of the deceased for duty purposes, and duty has in fact been paid on it. But it was said in *Milne's case*,¹ and is claimed in this case, that over and above the purchase price duty ought to be

¹ (1944) 69 C.L.R. 270.

paid on an appropriate proportion of the total value of the goodwill, agreed at £20,000. Yet all that the deceased's estate was entitled to receive was the purchase price; no one suggests that it was entitled to any more than it in fact received. The suggestion, apparently, is that the estate fell into two parts, one part being that which was purchased, and the other part being the subject of an agreement in the nature of a voluntary settlement.

It is submitted, first, that subsection (4) (c) and (e) of section 8 of the Estate Duty Assessment Act are envisaging that a settlor or disponor of property has an interest in the property which, but for the dispositions which he is making, would endure beyond his life—would form part of his estate—and that by the disposition in question he either, taking (c), cuts down his interest to a life interest, or, to bring a case under (e), makes an executory gift over on his death. Neither of these subsections has any reference to, or cannot in any way catch, a case in which the interest of the deceased in the property in question itself arises under, and is defined by, the document which is said to be the settlement or agreement in question.

Secondly, assuming that that is wrong, it is submitted that, the options having been exercised here, there was no question of a notional passing of a part of the deceased's interest under any of the provisions of section 8 (4). What happened was that the whole of his interest in the partnership assets, including the goodwill, and not treating it as separated from the other assets in any way, passed together in one mass to the purchaser under a contract of sale, for which an agreed purchase price was paid. It is not, and cannot be, suggested that that was not a bona fide sale, and, duty having been paid on the purchase price, that is all that the Crown is entitled to.

The basic fallacy in the majority judgments in the *Milne* case¹ is that they separated goodwill from the other assets of the partnership, and spoke as though the sale under the partnership deed was a sale of the other assets for the ascertained price, which fell under section 8 (3) as his "personal property," and the goodwill they treated as separate and not part of the sale, but as something which nevertheless passed to his surviving partners under an agreement under section 8 (4) (e). That is not the right way to look at the matter. In the events which happened in the *Milne* case¹ and in the present case, all the options being exercised, by a contract of sale the whole of the deceased's interest in the

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partnership assets, including goodwill, passed to the purchaser. Section 8 (4) (e) has nothing to do with this case; it can only be brought in by separating the goodwill from the rest of the assets of the partnership. The *Milne* case¹ did not grapple with the real point—that the whole interest, including goodwill, passed under the partnership deed to his executors subject to the options, and that being so there can be no scope for the operation of the provisions of section 8 (4) (e), which are merely designed to bring notionally into the estate something which did not form part of it. *Attorney-General v. Boden*² has no immediate bearing on the present case or *Milne's* case,³ because the wording of the relevant Act is quite different.

If duty on anything beyond the purchase price can be claimed, it cannot be claimed under section 8 (4); it must fall under section 8 (3). Treating the matter as falling under the latter subsection, the submission is that the proper way to value the interest under section 8 (3) has never been the subject of debate or decision in this case or in *Milne's* case.³ The Board has no material before it on which it can say whether or not any additional sum, and if so, what additional sum, can be properly claimed under section 8 (3). The proper course for the Board to adopt in those circumstances, assuming that it is of opinion that section 8 (4) does not apply, is simply to discharge the assessment under that subsection and leave it to the commissioner to take any further steps which he is advised, and to leave it open to the appellant to resist any such steps by such argument as it may deem necessary.

J. H. Stamp following. Where there is a bona fide contract for sale at anything like a commercial price, the property does not pass by virtue of a settlement; it passes by virtue of a purchase, and until the purchase price is paid the property does not even pass. The transaction contemplated by section 8 (4) (e) is a case in which the property passes by virtue of a settlement or agreement made by the deceased, and the transaction is one in the nature of a settlement, where the motive force is the will of the deceased, and not an equal bargain between him and someone else which depends on mutual concession. There is no justification for attributing to the estate a value greater than it can possibly derive from the assets; the estate is the aggregation of rights associated with obligations that cannot be severed from it, and

¹ 69 C.L.R. 270.³ 69 C.L.R. 270.² [1912] 1 K.B. 539.

those rights and obligations can only bring in in this case, and cases like it, the purchase price. This is quite plainly a section 8 (3) (b) case. The purchase price should be taxed; that is fair for everyone, is realistic, and conforms with the facts of the case. The purchase price is treated as substituted for the asset sold, which includes the goodwill, and that is all that really comes into the estate of the deceased. [Reference was made to Lindley on Partnership, 9th ed., pp. 726, 729, and to the *Milne* case.³]

Pascoe Hayward Q.C. and *V. M. C. Pennington* for the respondent. On the facts of this case, particularly having regard to the terms of the partnership agreement, the deceased's share of the goodwill and of all the other assets of the partnership devolved together on his death, and his whole interest in the partnership property accrued or passed under section 8 (4) (e), and his share of the goodwill is accordingly taxable as being included in the property of the deceased.

If that be wrong, then the whole of his share formed part of his personal property and is taxable under section 8 (3). That, it would appear, is conceded by the appellant. The share of the partnership assets would, of course, include the goodwill element in either event, and as a matter of valuation it does not matter whether subsection (3) or subsection (4) (e) of section 8 applies; in both cases the value has to be charged as mentioned in subsection (1) of section 8. So far as value is concerned, the appellant is bound by the agreement which was made in the courts below, and the assessment on £20,000 is right for that reason.

The primary contention advanced for the appellant before this Board is not fairly open to it, for nowhere in its printed case or in the objections which were put in in Australia, and which bind the subject in such litigation, was it suggested that it was being charged under the wrong head—subsection (4) (e) instead of subsection (3) (b). Nowhere is there any suggestion that the purchase price, on which it was agreed that duty should be charged, included some payment in respect of goodwill. The purchase price was in effect, and to the extent of £20,000, made at an undervalue, that £20,000 being the agreed value of the deceased's share in the goodwill. The assessment is therefore right. The main submission for the appellant has never been heard until presented to the Board. The appellant is seeking to resist the assessment on what is, it is submitted, a pure technicality. If the Board is against the respondent and holds that

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section 8 (3) applies, then it is suggested that the case should be remitted to Australia and the parties should be at liberty to raise such contentions as they think fit.

Pennington following. The Board should not take any course which would close the matter in the sense that the agreed purchase price should be taken as binding on the Crown. Secondly, the Board should not decide anything on the basis of Mr. Stamp's proposition that the only assessable subject-matter is that purchase price.

Geoffrey Cross Q.C. in reply. The first submission on behalf of the respondent is departing from the decision of the High Court in the *Milne* case.³ The contention that the whole of the interest passed under section 8 (4) (e) is just as novel as the submission for the appellant that it passed under section 8 (3) (b); the respondent's contention is not only novel, but wrong, because the two subsections are mutually exclusive. The deceased's whole interest in the partnership, including the goodwill, formed part of his estate under section 8 (3), and nothing was deemed to pass under section 8 (4) (e). There is sufficient in the appellant's printed case to entitle it to take the points it has raised before the Board. If section 8 (3) applies, the assessment should be discharged and the commissioner left free to make a fresh one if he chooses to do so.

1954. January 19. The judgment of their Lordships was delivered by LORD COHEN. This appeal relates to an assessment made by the respondent under the Estate Duty Assessment Act, 1914-42, in respect of the estate of the late Frederick Charles Henry Thomas (hereinafter called Mr. Thomas) who died on January 28, 1944. The appellant is the executor of his will.

The principal asset of the testator was his interest in a firm carrying on business as furniture warehouseman under the name and style of "Maples" pursuant to a deed of partnership made on December 22, 1939, as modified by a supplementary agreement dated December 4, 1940, the other partners being Robert Nathan, Mrs. Louisa Jones, Mrs. Lorna Hannon, Lionel Newton, Lauri Joseph Newton and Donald Lamond.

Clause 5 of the deed provided that the capital of the partnership (thereinafter called the capital) should consist of the then existing assets of the partnership. Their Lordships pause here to observe that the parties agreed that despite this definition the expression "the capital," so far as the question now at issue is

concerned, meant the capital as at the date of the death of Mr. Thomas.

Clause 6 defined the interests of each partner in the capital and allotted to Mr. Thomas $19\frac{1}{2}$ per cent. thereof. Clause 8 provided that the net profits of the business should be divided between the partners in proportion to their respective shares from time to time in the capital.

Clause 9 provided that the partnership should not be dissolved by the death or retirement of any of the partners, and contained provisions defining as regards each partner what was to happen in the event of his or her death or retirement. So far as Mr. Thomas was concerned, the clause conferred options on the surviving or continuing partners, other than Donald Lamond, to purchase Mr. Thomas' share in the capital in specified proportions, the details of which are not material to the issues their Lordships have to decide.

Clause 12 defines how the purchase price is to be ascertained in the event of any of the options being exercised, and is in the following terms:—

“12.—Upon the exercise of the respective options herein-
“before contained the purchase price payable on the exercise
“of such option shall be the total of the following amounts
“(namely):—

“(a) The proportionate part of the balance of assets over
“liabilities as disclosed in the balance sheet of the partnership
“in respect of the accounting year of the partnership prior to
“the date on which such option shall first be exercisable corre-
“sponding to the part of the interest in the partnership being
“purchased PROVIDED ALWAYS that if in compiling the relevant
“balance sheet the value of the book debts shall not have been
“treated as fifteen shillings for each pound of the actual debts
“owing at the end of the period in respect of which such balance
“sheet shall have been compiled the said balance of assets over
“liabilities shown by the relevant balance sheet shall be adjusted
“by taking the said book debts into the said balance sheet at a
“value of fifteen shillings for each pound; and

“(b) The like proportion of any real estate which shall have
“been acquired by the partnership between the end of the said
“period and the date on which the relevant option shall have
“been first exercisable (hereinafter called the current year) at
“the price at which the same shall have been acquired plus any
“amounts expended thereon by the partnership during the current

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“ year less any liability existing on such real estate to the vendor
“ thereof or under any mortgage thereover.

“ (c) The like proportion of the profits of the partnership for
“ the current year ascertained in the manner provided in clause
“ 13 hereof.

“ PROVIDED ALWAYS and it is hereby agreed and declared that
“ the balance sheet signed by the parties hereto at the time of
“ the execution of these presents shall be deemed to be the
“ balance sheet of the partnership for the accounting year of the
“ partnership ended on the twenty-eighth day of February One
“ thousand nine hundred and thirty-nine. WITHOUT affecting
“ the generality of the foregoing provisions it is specifically agreed
“ and declared that in computing the amount of purchase money
“ payable on the exercise of any option no sum shall be added
“ or taken into account for goodwill.”

Clause 14 gave a person exercising an option the right to pay the purchase money by instalments, and provided for interest at the rate of £5 per cent. per annum on any balance for the time being unpaid. It also provided that on the exercise of any option the purchaser should be deemed to have acquired the interest in respect of which the option had been exercised as from the date that such option shall have been given or deemed to have been given—in the present case in the event which happened, as from the date of the death of Mr. Thomas.

Clause 19 fixed the end of each accounting year of the partnership as February 28.

The terms of the supplementary agreement are not material to any issue their Lordships have to decide.

Mr. Thomas having died on January 28, 1944, the partners who survived him duly exercised the options conferred on them. The purchase price was ascertained in accordance with the provisions of clause 12 of the partnership deed and was fixed at £156,217 11s. 3d. In accordance with the last sentence of that clause no sum was added or taken into account for goodwill. The purchase price was duly paid.

It will be convenient at this stage to refer to the relevant provisions of the Estate Duty Assessment Act, 1914–42. Section 8, so far as is material, is in the following terms:
“ (1) Subject to this Act, estate duty shall be levied and paid
“ upon the value, as assessed under this Act, of the estates of
“ persons dying after the commencement of this Act.

“ (3) For the purposes of this Act the estate of a deceased
“ person comprises:— . . . (b) His personal property wherever

“ situate (including personal property over which he had a general power of appointment exercised by his will), if the deceased was at the time of his death, domiciled in Australia.

“(4) Property— . . . (e) being a beneficial interest in property which the deceased person had at the time of his decease, which beneficial interest, by virtue of a settlement or agreement made by him, passed or accrued on or after his decease to, or devolved on or after his decease upon, any other person . . .

“ shall for the purposes of this Act be deemed to be part of the estate of the person so deceased.”

“ Settlement ” is defined by section 3 as follows:—

“ Settlement means a conveyance, transfer, appointment under power, declaration of trust or other non testamentary disposition of property made by any person either before or after the commencement of this Act containing trusts or dispositions to take effect after the death of the settlor or any other person dying after the commencement of this Act.”

Section 10 imposes on the administrator of a deceased person the duty of preparing and furnishing in the prescribed form a statement setting forth a full and complete return of all the estate in Australia of the deceased person.

Section 15 imposes on the respondent the duty of making an assessment for the purpose of ascertaining the duty payable.

Section 24 entitles an administrator who is dissatisfied with an assessment so made to lodge with the respondent notice of objection within 30 days after service of the notice of assessment. If the administrator is dissatisfied with the decision of the respondent on his objection, he has alternative remedies, the remedy relevant to the present case being a right to request the respondent to treat his objection as an appeal and to forward it to the High Court. Section 27 (1) provides that the appeal shall be heard by a single justice. By section 27 (3) it is provided that the objector shall be limited, on the hearing of an appeal, to the grounds stated in his objection.

The appellant duly made a return pursuant to section 10 on June 20, 1944. In the statement of assets annexed thereto there appears the following entry, “ Interest in a partnership as per balance sheet and valuations as per Schedule 9 ‘ £156,217 11s. “ 3d.’ ” Schedule 9 is in the following terms:—

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“ Interest in a partnership

“ Value of deceased's 19½% interest in

“ the partnership known as Maples ... £156,217 11s. 3d.”

(The amount set out is the amount at which the executor of the deceased is obliged to sell the deceased's interest in the said partnership pursuant to partnership deed dated December 22, 1939, under which all but one of the surviving partners have the option of purchasing the interest of the deceased.)

On February 14, 1947, the respondent served notice of assessment on the appellant together with a federal estate duty alteration sheet which showed the alterations made in the assessable value shown in the return lodged. These included the following additions:—

“ Interest in partnership of Maples undervalued £36.

“ Proportion of goodwill in Maples, s. 8 (4) (e) £20,000.”

The last addition was, their Lordships think, made in this form as the result of the decision of the Full Court of the High Court in *Trustees Executors and Agency Co. Ltd. v. Federal Commissioner of Taxation*.¹ The judgment in that case was given on August 1, 1944, in a matter relating to the estate of James Brown Milne, deceased, and their Lordships will refer to the case hereafter as “*Milne's case*.” Milne was a partner in the firm of John Sanderson & Co., and the partnership deed was similar in every material respect to the partnership deed in the present case. On Milne's death his partners exercised their option to take over his share in the partnership capital at a price ascertained in accordance with the provisions of the deed, which included a provision that on the death, retirement or expulsion of a partner no allowance should be made to him or his representatives in respect of the value of the goodwill of the business. The court by a majority (Rich, Starke and Williams JJ.; Latham C.J. and McTiernan J., dissenting), held that within the meaning of section 8 (4) (e) of the Act the deceased partner at the time of his death had a beneficial interest in the goodwill which, on or after his death, by virtue of the partnership agreement passed or accrued to, or devolved on, the surviving partners. Their Lordships will have to return later to *Milne's case*,¹ but they pause here to observe that it was not argued in that case that Milne's interest in the goodwill fell to be assessed under section 8 (3).

¹ (1944) 69 C.L.R. 270.

It seems to have been common ground between the parties and to have been accepted by both majority and minority of the court that while Milne's interest in the other assets of the partnership was assessable under section 8 (3) (b), his interest in goodwill was assessable, if at all, only under section 8 (4) (e). The majority held that it was so assessable, but the minority were of opinion that, having regard to the terms of the partnership deed, it ceased on the death of a partner and therefore could not fall within section 8 (4) (e).

On March 14, 1947, the appellant lodged notice of objection pursuant to section 24 of the Act. It is clear from the terms of that notice that it was primarily directed to supporting the view of the minority in *Milne's* case,¹ but having in mind a submission that was made by Mr. Pascoe Hayward, for the respondent, their Lordships would call attention to paras. 23, 24 and 25 of the notice of objection which were in the following terms: "That as
 " at the date of his death the interest of the deceased was a
 " right to receive the purchase price payable upon the exercise
 " of the options contained in the articles of partnership in respect
 " of the said firm, dated the twenty-second day of December
 " 1939 as amended by indenture dated the fourth day of
 " December 1940 made between the partners of the said firm,
 " and on the exercise of the said options no amount was payable
 " in respect of goodwill. That the interest of the deceased in
 " the assets of the partnership ceased at the date of death of
 " deceased conditionally upon the exercise of the said options
 " and payment of the purchase price which options have been
 " exercised and which purchase money has been paid. That the
 " estate of deceased is not dutiable in respect of any proportion
 " of goodwill of the said firm of Maples pursuant to section 8 (4)
 " (e), or any other provision, of the Estate Duty Assessment
 " Act."

On January 29, 1948, the respondent disallowed the objection. On March 4, 1948, the appellant required the respondent to treat the objection as an appeal and to forward it to the High Court.

The appeal came before Williams J. on March 8, 1949, Mr. Tait K.C. appearing for the appellant and Mr. T. W. Smith K.C. appearing for the respondent. In the transcript of the proceedings there appears the following passage from Mr. Tait's opening speech: "That being cleared up, it left one matter in dispute
 " between the parties, the matter now before the court. That

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“ is the question of goodwill, namely, that in valuing that asset
“ of the deceased which consisted of his interest in the partner-
“ ship, account should be taken of the value of the goodwill.
“ The parties have gone further. They have agreed upon what
“ that value would be if it should be included, and the figure is
“ £20,000. This matter was the subject of a decision in this
“ court in *Milne's* case¹ comparatively recently.”

Mr. Smith, for the respondent, said that the respondent would not be relying on any other provisions of the Act apart from section 8 (4), though he might wish at some later stage to rely on grounds not precisely in accordance with the views of the majority in *Milne's* case.¹ At the conclusion of the argument the transcript records the following observations: “ Mr. Tait: I
“ mentioned, I think, the parties had agreed, if the value of this
“ goodwill was to be included, the figure should be £20,000.
“ Perhaps that could be taken as a mutual admission. Mr.
“ Smith: That has been agreed to, £20,000 as the value of
“ the share of the goodwill if it be taxable. His Honour: Very
“ well.”

On the same day Williams J. delivered judgment dismissing the appeal. The material portion of his judgment was in the following terms: “ The respondent, without giving up any other
“ contentions open to him upon the true construction of the
“ Act, contends that it forms part of his [the testator's] notional
“ estate within the meaning of section 8 (4) (e) of the Act. It
“ seems to me necessarily to follow from *Milne's* case¹ that this
“ contention must succeed. I must therefore order that the
“ appeal be dismissed with costs.”

The appellant appealed to the Full Court, who dismissed the appeal saying: “ It is conceded that this appeal must fail unless
“ the court is prepared to reconsider and to overrule the decision
“ in *Trustees Executors and Agency Co. Ltd. v. Federal Commis-
“ sioner of Taxation*.¹ The decisions of a superior court have a
“ double aspect. They determine the controversy between the
“ parties, and in deciding the case they may include a statement
“ of principle which it is the duty of that court and of all sub-
“ ordinate courts to apply in cases to which that principle is
“ relevant. Continuity and coherence in the law demand that,
“ particularly in this court, which is the highest court of appeal
“ in Australia, the principle of *stare decisis* should be applied,
“ save in very exceptional cases.

¹ 69 C.L.R. 270.

“The court is not bound by its previous decisions so as absolutely to preclude reconsideration of a principle approved and applied in a prior case but, as was stated in *Cain v. Malone*,² the exceptions to the rule are exceptions which should be allowed only with great caution and in clear cases. Barton J. in *The Tramways* case,³ which has been referred to by Mr. Tait, said⁴: ‘I have never thought that it was not open to this court to review its previous decisions upon good cause. The question is not whether the court can do so, but whether it will, having due regard to the need for continuity and consistency in judicial decision.’ His Honour proceeded to say: ‘Changes in the number of appointed justices,’—(and I would add, changes in the personnel of the bench which happens to deal with the first case or a second case)—‘can, I take it, never of themselves furnish a reason for review.’ His Honour continued: ‘But the court can always listen to argument as to whether it ought to review a particular decision, and the strongest reason for an overruling is that a decision is manifestly wrong, and its maintenance is injurious to the public interest.’ In the present case, there are no circumstances which would justify, in accordance with those principles, an overruling of the decision in *The Trustees Executors* case.⁵ The only circumstance which is really relied upon for the purpose of persuading the court to reconsider the decision is that it was a majority decision. This is plainly an insufficient ground for asking the court to overrule a previous considered decision of five justices. It may be that considerations are present in constitutional cases, where Parliament is not in a position to change the law, which do not arise in other cases. In what I have said I make no reference to constitutional cases. The consequence is that, if the court adheres, as it should, to the decision in *The Trustees Executors* case,⁵ the appeal must fail.”

Their Lordships have thought it desirable to set out in full the judgment of the Full Court in order to make it clear that neither in *Milne's* case⁵ nor in the present case was any argument addressed to the High Court in support of the proposition advanced before their Lordships that the deceased's interest in goodwill was part of his estate as being personal property within section 8 (3) (b) and could not therefore be property not

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² (1942) 66 C.L.R. 10.³ (1914) 18 C.L.R. 54.⁴ *Ibid.* 69.⁵ 69 C.L.R. 270.

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actually forming part of the estate but only deemed to be part of the estate under section 8 (4).

From this decision the appellant appeals to this Board pursuant to special leave granted by His late Majesty on May 24, 1950. The reasons given by the appellant in this case for inviting your Lordships to reverse the decision of the High Court were directed in the main to supporting the views of the minority in *Milne's* case,⁵ but reason 3 was in the following terms: "Because under the partnership agreement in the events which "happened the deceased had no interest in the specific assets "of the partnership after his death but only the right to receive "the purchase price payable by the survivors."

The reasons advanced by the respondent in support of the judgment in the court below were intended primarily to support the judgment of the majority in *Milne's* case,⁵ but in paragraph 25 of his case the respondent intimated his intention of advancing in the alternative the following contentions: "(i) That the "deceased had at his death an undivided share in all the assets "of the partnership. (ii) That the concluding words of the proviso to clause 12 of the partnership deed did not have the effect "of divesting the deceased on his death of his share in the "goodwill as one of those partnership assets. (iii) That, consequently, the deceased's said undivided share of the goodwill "was as much part of his personal property within the meaning "of section 8 (3) (b) of the Act as was his undivided share in "any other asset of the partnership, and, on the subsequent "purchase of his share in the partnership, his undivided share "in the goodwill passed to the purchasers in the same way as "did his undivided share in all the other assets of the partnership. (iv) That in assessing, pursuant to section 8 (1) of the "Act, the value of such part of the estate of the deceased as consisted of the deceased's share in the partnership, the respondent "was not bound to accept as such value the price paid by the "other partners when they subsequently purchased that share. (v) That such purchase was in effect, and to the extent of "£20,000, made at an undervalue, such £20,000 being the agreed "value of the deceased's share in the goodwill. (vi) That, in "consequence, the assessment is right."

When the case came before their Lordships, Mr. Cross attacked the reasoning of the majority in *Milne's* case,⁵ but he did not seek to defend the reasoning of the minority. He argued

that Mr. Thomas's interest in the goodwill was only part of his interest in the partnership assets and that the whole of such interest was part of the personal property forming part of Mr. Thomas's estate and fell within section 8 (3) (b). Mr. Pascoe Hayward, for the respondent, did not seek to support that part of the majority in *Milne's* case⁵ which was based on a severance between the deceased's interest in goodwill and his interest in the other partnership assets. See, e.g., where Starke J. said⁶: "The question whether the commissioner was right in so including the value of the goodwill in his assessment depends upon several provisions of the Estate Duty Assessment Act. By section 8 (3) (b) the estate of a deceased person comprises, inter alia, his personal property if the deceased was at the time of his death domiciled in Australia. No doubt the partnership interest of the deceased was part of his estate, yet that interest did not include goodwill, for the partnership deed itself expressly provided that no allowance should be made to the deceased or his representatives in respect of the value of the goodwill of the business."

Mr. Pascoe Hayward argued that the whole of the deceased's interest in the partnership assets, including goodwill, fell to be assessed under section 8 (4) (e). Their Lordships' reasons for rejecting this argument will appear sufficiently from the reasons which their Lordships will now proceed to give for thinking that *Milne's* case⁷ was wrongly decided. In *Milne's* case⁷ three questions were submitted for the opinion of the Full Court, the first and third of which were as follows:—" (1) Whether the dutiable estate of the testator included any and if any what interest in the goodwill of the said partnership. (3) Whether the testator had at the time of his death any beneficial interest in the said goodwill which by virtue of the said indenture of partnership passed or accrued on or after his death or devolved on or after his death on any of the said surviving partners of the said firm of Sanderson & Co."

It is clear from the judgments that the Full Court treated the first question as asking whether the interest of the deceased in goodwill was dutiable under section 8 (3). All the judges answered question 1 in the negative except Rich J., who found it unnecessary to answer the question. The majority answered question 3 in the affirmative. It is clear from their judgments that all the judges, with the possible exception of Rich J.,

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⁵ 69 C.L.R. 270.⁷ 69 C.L.R. 270.⁶ *Ibid.* 286.

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proceeded on the basis that the deceased's estate never became entitled to a share in the value of the goodwill and that the majority regarded the deceased's share in goodwill as something severable from his interest in the other assets of the partnership and passing or accruing to another person under section 8 (4) (e). Their Lordships are unable to accept either of these propositions. In their Lordships' opinion the interest of Milne in all the partnership assets, including goodwill, vested in his executors on his death, although his executors would be bound, if the option were exercised, to transfer that interest to the purchaser at the price fixed in accordance with the partnership deed. For this reason their Lordships accept the alternative proposition advanced by Mr. Pascoe Hayward, with which Mr. Cross did not quarrel, that the whole of the deceased's interest in the partnership property, including goodwill, was assessable to duty under section 8 (3) (b). Being so assessable, it necessarily follows that that interest cannot be assessable under section 8 (4), which deals only with property not actually assessable as part of the estate falling within section 8 (3) but which is to be deemed to form a part of the estate.

This conclusion is sufficient to dispose of the matter so far as the respondent's case rests on section 8 (4) (e), but their Lordships feel bound to add that they feel grave doubt whether considering only the language of section 8 (4) (e) the respondent can bring the facts of this case within it. To do so he must rely on the exercise of the option, for it is plain that if it is not exercised, section 8 (4) (e) will have no application. That option under clause 9 of the partnership deed is to be deemed to have been given by the legal personal representatives of Mr. Thomas, and on its being exercised there comes into being a contract of sale between them and the option holders. Such a transaction seems to their Lordships somewhat remote from a transaction of the kind which the language of section 8 (4) (e) appears to contemplate.

In *Milne's* case⁷ Latham C.J., one of the minority, relied⁸ on the decision of Hamilton J. (as he then was) in *Attorney-General v. Boden*⁹ for the proposition that where a partnership deed provides that no allowance for goodwill should be made to a partner or his estate upon his death his interest in the goodwill did not pass upon his death.

In *Attorney-General v. Boden*⁹ the deceased had carried on

⁷ 69 C.L.R. 270.

⁹ [1912] 1 K.B. 539.

⁸ Ibid. 282.

business in partnership with his sons under a deed which contained a provision that on his death his share was to accrue to his sons in equal shares subject only to their paying out to his representatives the value of his share as at the date of his death ascertained by proper valuation without any valuation of or allowance for goodwill. The Crown claimed duty under section 2 (1) (b) of the Finance Act, 1894, on the footing that the deceased's interest in goodwill was property in which the deceased had an interest ceasing on the death of the deceased. The defendant claimed that the share in goodwill passed on the death of the deceased under section 1 of the Finance Act, 1894, and therefore could not fall within the ambit of section 2 in view of the decision of the House of Lords in *Earl Cowley v. Inland Revenue Commissioners*.¹⁰ They submitted, however, that it was really unnecessary to decide this point since the transaction between the father and his sons fell within the ambit of section 3 (1) of the Act, which exempts from duty property passing on the death of a deceased by reason only of a bona fide purchase from the person under whose disposition the property passes where such purchase was made for full consideration in money or money's worth paid to the vendor for his own use and benefit. Hamilton J. upheld this submission. His decision on this point would have been sufficient to dispose of the case, but he also dealt with the other point which he described as a minor point.¹¹ On this he came to the conclusion¹² that the case fell within section 2 (1) (b) and not within section 1. Their Lordships are unable to agree with this view. In their opinion the deceased partner's interest in goodwill in such a case must pass with his interest in the other assets to his legal personal representative, and the fact that its value is not to be taken into account in calculating the price receivable by the estate for his interest in the partnership is irrelevant.

Mr. Pascoe Hayward, however, submitted that even if their Lordships came to the conclusion they have indicated, their Lordships ought to dismiss the appeal either (a) on the ground that the record of the hearing before Williams J. indicated an agreement that if the share in goodwill formed part of the assessable estate (and their Lordships have indicated that it is assessable property under section 8. (3)), its value was agreed at £20,000; and (b) on the ground that the contention advanced by

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¹⁰ [1899] A.C. 198; 15 T.L.R. 270.

¹² *Ibid.* 556.

¹¹ [1912] 1 K.B. 539, 555.

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Mr. Cross which their Lordships consider well founded, viz., that the share in goodwill was assessable only under section 8 (3), was not open to the appellant as it was not to be found either in the reasons in their case or in their notice of objection.

So far as the first of these points is concerned, Mr. Pascoe Hayward himself said that there are three possible views as to the ambit of the agreement: (1) that the parties were envisaging that Mr. Thomas's share in the goodwill was assessable under section 8 (4) but his interest in the other assets was assessable under section 8 (3), in which event the agreed value would not apply if his share in all the assets were assessable under section 8 (3); (2) that the agreed value was to apply if the deceased's share in all the assets including goodwill fell within section 8 (4) (e); (3) that the agreed value was binding no matter under which subsection the deceased's share in the assets fell to be assessed.

Seeing that the parties were obviously dealing with the matter on the footing that the issue would depend on whether the majority or the minority view in *Milne's* case¹³ was to prevail, the first of these alternatives seems the most probable, but their Lordships were informed that there was some correspondence relating to the agreement which was not available to their Lordships. In these circumstances their Lordships are not prepared to say more than that it would obviously be improper for them to hold that the appellants are precluded by the agreement from succeeding on this appeal.

On the second point their Lordships need not spend any time in examining the appellant's case, for their Lordships are satisfied that if the contention advanced by Mr. Cross was within the ambit of the notice of objection, it is sufficiently covered by their third reason, to which their Lordships have already referred. If, however, it was not within this notice of objection a question of jurisdiction would arise since section 27 (3) of the Estate Duty Assessment Act, 1914-42, limits the objector to grounds stated in his objection. Had the appellant confined his notice of objection to stating as his ground that (see paragraph 25 of the notice of objection), "the estate of deceased is not dutiable in respect of any proportion of goodwill of the said firm of Maples pursuant to section 8 (4) (e)" there could have been no doubt but that the appellant was entitled to argue that it could not be deemed to be part of the estate under section 8 (4) (e) because it

¹³ 69 C.L.R. 270.

was actually part of the estate under section 8 (3). Mr. Pascoe Hayward submits that the appellant is deprived of his right to present this argument because, as he says, the preceding paragraphs show that paragraph 25 was not directed to this point. Their Lordships, however, think that the necessary foundation for the argument is to be found in paragraphs 23, 24 and 25 when read together, and must therefore refuse to dismiss the appeal on the ground that the argument falls outside the grounds stated in the objection.

Mr. Cross invited their Lordships, if they reached this conclusion, to allow the appeal and amend the assessment by striking out the £20,000 added under section 8 (4) (e) in respect of the deceased's proportion of the goodwill of Maples. Their Lordships are not prepared to adopt this course, which would mean that the respondent could only claim duty in respect of this item under section 8 (3) if he could make a new assessment. Their Lordships do not know whether this would be possible or not and do not find it necessary to investigate the possibility. The appellant has succeeded only on a ground which was not argued either before Williams J. or before the Full Court. In these circumstances their Lordships consider that the proper course to adopt is to declare that the deceased's interest in the goodwill, as in the other assets of the partnership, is part of the testator's estate within section 8 (3) and is not to be deemed to be part thereof under section 8 (4) and to remit the matter to the High Court to make such order as the High Court may think fit on the footing of this declaration. This order will enable the parties to advance before the High Court such arguments as they may think proper having regard to that declaration. In particular, but without restricting in any way the generality of the arguments, (1) it will enable the respondent to allege that the agreement referred to on p. 17 of the record binds the appellant to accept the figure of £20,000 as the value of the deceased's interest in the goodwill under whatever subsection it is held to form part of the assessable estate; (2) it will enable the appellant to allege (a) that the respondent is bound by the valuation made pursuant to the partnership deed which represents the utmost the estate can ever receive; alternatively, (b) that if it is open to the respondent to go behind the figure thus ascertained, the existence of the option must be taken into account in arriving at

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the value of Mr. Thomas's interest in the partnership assets. Both these points were raised before their Lordships, but in view of the advice which their Lordships propose to tender to Her Majesty, their Lordships express no opinion thereon.

For these reasons their Lordships will humbly advise Her Majesty to allow the appeal and set aside the orders of Williams J. and of the Full Court and to declare that the share and interest of the late Frederick Charles Henry Thomas in the assets of the firm or partnership carried on under the name or style of "Maples," including the goodwill thereof, was part of his estate within subsection 3 of section 8 of the Estate Duty Assessment Act, 1914-1942, and that no part of such share or interest is to be deemed to be part of his said estate under subsection 4 of the said section, and to refer this matter back to the High Court of Australia to reconsider the objection of the appellant to the assessment made by the respondent in the light of the declaration aforesaid and in particular, but without prejudice to the generality of the foregoing, to determine (a) whether any binding agreement has been made between the appellant and the respondent which fixed the value of the said share and interest of the said Frederick Charles Henry Thomas in the business and assets of the said firm, including the goodwill thereof, and if not, (b) what value ought to be placed thereon under section 8 (1) of the said Act having regard to all relevant circumstances.

If upon such reconsideration by the High Court the appellant secures a reduction in the assessed value of the said estate, the respondent shall pay the appellant's costs of the appeal to this Board. If the appellant fails to secure such reduction each party shall pay his own costs of such appeal. The costs of all the proceedings in the High Court of Australia are to be in the discretion of that court.

Solicitors: *Crowther & Gray; Coward, Chance & Co.*

BANK OF NEW SOUTH WALES . . .	APPELLANT;	J. C.*
AND		
WALTER RICHARD JAMES LAING . . .	RESPONDENT.	1953 Dec. 7.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Australia (New South Wales)—Practice—Pleading—Claim for money lent—Indebitatus assumpsit count—Plea of “never indebted”—Effect—Nature of onus on plaintiff—Banker and customer—Current account—“Peculiar incidents” of relationship—Rules made under Common Law Procedure Act, 1899 (New South Wales), r. 65.

Practice. Banking—Current account—Demand for payment—Necessity of proving in full sufficiency of credit balance.

For a number of years the plaintiff had a current account with the defendant bank into which he from time to time had paid sums amounting in the aggregate to over £100,000, and he had also at intervals drawn on the account. He suspected that eight cheques, totalling £19,412 odd and debited to his account, had been forged, and when so debited they had reduced his credit balance to about £18. He thereupon presented to the defendant bank eight other cheques for amounts exactly corresponding to those of the cheques which he alleged had been forged, and the bank having refused to meet his cheques, he claimed the £19,412 odd from it by specially indorsed writ. New South Wales has retained the system of pleading which existed in England under the Common Law Procedure Act, 1852—the provisions of which and the Rules made thereunder are in substance reproduced in the Common Law Procedure Act of 1899 of New South Wales and the Rules made under that Act—and in pursuance of that procedure the plaintiff filed a declaration based on the old “indebitatus assumpsit” count in the following terms: “For money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff and for money payable by the defendant to the plaintiff for money lent by the plaintiff to the defendant,” and he claimed the £19,412 odd.

To that declaration the bank filed the plea of “never indebted.” At the trial neither party gave oral evidence. The plaintiff put in evidence, inter alia, a copy of his current account, a letter from the bank to the Bank of Australasia (through which he had presented the eight cheques) returning the cheques and stating, “bona fide dispute state of account arising alleged forged cheques,” and also the eight cheques as evidence of his demand, relying on those documents cumulatively as admissions by the bank sufficient to entitle him to succeed. The case turned, not on the merits—the genuineness or not of the alleged forged cheques—but on a point of pleading, namely, the effect of the plea of “never indebted” in the circumstances of this case:—

* *Present*: LORD PORTER, LORD REID, LORD TUCKER, LORD ASQUITH OF BISHOPSTONE and LORD COHEN.

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Held, that English authorities and the wording of rule 65 of the Rules made under the Common Law Procedure Act of New South Wales—which provided that a “plea of ‘never indebted’ will operate “as a denial of those matters of fact from which the liability of the “defendant arises”—showed that on an issue of “never indebted” the onus of proving the fulfilment of conditions precedent to the present payability of the debt was on the plaintiff.

Indebitatus counts were directed to a debt solvendum in praesenti—a debt “presently payable”—and it was such a debt which the plea “never indebted,” filed in answer to an indebitatus count, denied and put in issue. The plea put in issue the promise implied by law to pay presently, which only arose if and when the conditions precedent had been performed, and consequently put in issue the performance of those conditions, and put the proof of them on the plaintiff. In a customer and banker case one such condition precedent was the existence in the customer’s account of funds sufficient to meet the demand on them. It was for the customer to establish that sufficiency as subsisting at the time of demand.

Hudson v. Bilton (1856) 6 E. & B. 565 and *Broomfield v. Smith* (1836) 1 M. & W. 542 applied.

Whether or not an indebitatus count was used to recover money lent, where the creditor was a customer and the debtor a bank on current account the “peculiar incidents” of that relationship governed the legal position and required that, to succeed, the plaintiff must prove a “demand,” and also that the “balance” standing to his credit at the time of demand sufficed to pay his demand. If the balance fell short of doing so, even by one penny, he failed altogether.

In the present case the plaintiff did not discharge the onus which was on him. He gave no oral evidence, and the only evidence consisted of the current account and the defendant bank’s letter to the Bank of Australasia, and neither of those documents in themselves, nor the two in combination, amounted to an admission by the bank that at the date of demand the plaintiff’s account contained sufficient funds to meet the demand for £19,412 odd.

Judgment of the Full Court of the Supreme Court of New South Wales reversed.

APPEAL (No. 15 of 1953) from a judgment of the Full Court of the Supreme Court of New South Wales (October 7, 1952), affirming a judgment of McClemens J. (May 19 and 20, 1952), in an action in which the jury was by consent dispensed with at the trial.

From January, 1947, to February, 1951, the plaintiff was a customer of the defendant bank and had a current account with it, into which in that period he from time to time paid sums amounting in the aggregate to over £100,000. At intervals during that period cheques were presented to the bank drawn on this account, and were met by the bank. By February 8, 1951 (indeed,

earlier, in October, 1950), the plaintiff had come to believe or suspect that some of the cheques debited to his account had been forged. Those were eight cheques totalling £19,412 10s. 9d. The effect of debiting those cheques to the plaintiff's account was to reduce the credit balance, by February 8, 1951, to about £18. On that date the plaintiff presented to the defendant bank through the Bank of Australasia eight other cheques for amounts exactly corresponding to those of the cheques which he claimed were forged. If they were forged, the bank should not have honoured them, and if it had not done so there would, on February 8, 1951, have been £19,412 10s. 9d. in the account and about £18 to spare, and the eight cheques of that date could accordingly have been met. The bank returned the eight cheques of February 8, 1951, to the Bank of Australasia indorsed "refer to drawer: bona fide "dispute arising alleged forgeries." The plaintiff customer thereupon, by specially indorsed writ of February 16, 1951, claimed £19,412 10s. 9d. as money "received by the defendants to the "use of the plaintiff," the writ being subsequently amended to include a claim for money lent. Particulars followed of the amounts of the "forged" cheques totalling £19,412 10s. 9d.

At the trial of the action no oral evidence was given with regard to the genuineness or otherwise of the alleged forged cheques, and the case turned on a point of pleading with regard to the onus of proof where an indebitatus count has been answered by a plea of "never indebted."

The trial judge (McClemens J.) found a verdict and entered judgment for the plaintiff for £19,412 10s. 9d., and his judgment was affirmed on appeal to the Full Court of the Supreme Court of New South Wales (Street C.J., Owen and Herron JJ.).

1953. Oct. 14, 15, 19, 20, 21 and 23. *Sir Garfield Barwick Q.C.* (Australia) and *J. G. Le Quesne* for the defendant bank (appellant). There are three distinct but interrelated questions. (A) What was the cause of action of the plaintiff on which he was suing? (B) What was the banker's relevant promise? (C) On any view, was the proof adequate? With regard to (A), the plaintiff's only cause of action was one which arose out of the non-payment of the eight cheques presented by him. For the form for suing a banker, see Bullen & Leake's *Precedents of Pleadings*, 10th ed. (1950), p. 85, and *Marzetti v. Williams*.¹ The cause of action, though necessarily, or at least ordinarily, cast in the form

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¹ (1830) 1 B. & Ad. 415, 416.

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of money lent, is not for failure to perform a general promise to repay the sums deposited, but to recover a specific sum of money for the payment of which due demand has been made. Whether or not the banker was at the time of such demand obliged to make such a payment depends, not upon the amount formerly deposited, but upon the then state of account between him and the customer, upon the credit balance in the account. A banker is under an obligation to pay a particular demand; but if the demand is for one penny more than the balance he is under no obligation whatever to pay that demand. The plaintiff made no demand on his bankers except for the last eight cheques. A demand is of the essence of the cause of action against a banker: *Joachimson v. Swiss Bank Corporation*²; *Pott v. Clegg*³; *Pollard v. Ogden*.⁴ The plea of "never indebted" filed by the defendant bank in answer to the plaintiff's claim to be paid the specific sums demanded laid on the plaintiff the necessity of establishing as part of his case the state of his account with the defendant at the date of the demand for payment of the several sums in suit. A plea of "never indebted" denies everything out of which the plaintiff's cause of action arises: rule 65 of the Rules made under the New South Wales Common Law Procedure Act, 1899; *Bullen & Leake*, 3rd ed., pp. 462-3. Both sides of the account were evidence, and the debits so qualified the credits that the only admission constituted by the document is the balance from time to time: *Taylor on Evidence*, 12th ed., p. 465, para. 725; *Boardman v. Jackson*⁵; *Cobbett v. Grey*⁶; *Kilbee v. Sneyd*⁷; *Reeve v. Whitmore*⁸; *Randle v. Blackburn*⁹ and *Wigmore on Evidence*, 1904 ed., vol. 3, p. 2867, para. 2118. There was no evidence that the amount standing to the credit of the plaintiff with the defendant at the date of the plaintiff's demand was equal to or greater than the amount demanded by him.

Heads (B) and (C) (supra) both involve these steps. (1) It is true that the relationship between the banker and customer is that of debtor and creditor. (2) It is also true that the amount due on demand at any time may be recovered as money lent in point of form, and recovered upon an indebitatus assumpsit count. (3) It does not follow from those steps that the relationship of the banker and customer is merely that of debtor and creditor in

² [1921] 3 K.B. 110, 116 et seq.;
37 T.L.R. 534.

³ (1847) 16 M. & W. 321, 322.

⁴ (1853) 2 E. & B. 459.

⁵ (1813) 2 Ball & Beatty 382, 385.

⁶ (1849) 4 Exch. 729, 737.

⁷ (1828) 2 Molloy 186, 193.

⁸ (1865) 2 Dr. & Sm. 446, 449.

⁹ (1813) 5 Taunt. 245, 246.

respect of its deposits. (4) Nor does it follow that the total of the deposits in the current account is to be treated as *the* money lent for the purposes of the pleadings and proceedings to recover the amount due after demand. (5) The money lent for the purpose of such pleadings and proceedings is the amount outstanding on the current account at the date of the demand. (6) The banker's promise to be implied from the relationship of banker and customer, and from the fact that the deposit is made, is to honour the customer's cheques and accept his drafts up to the amount outstanding in the current account at the respective times of their presentment, and on demand to pay to the customer the amount outstanding in such account at the date of the demand or any part thereof which may be demanded. (7) Insufficiency of the amount outstanding on the account to cover the demand is not an excuse for non-payment of the demand which the banker must assert by way of confession and avoidance; if the amount outstanding is insufficient to cover the demand there never arises an obligation on the banker to pay the particular sum demanded. (8) The sufficiency of the amount outstanding is a fact out of which the banker's liability or obligation to pay the specific sum demanded arises. Therefore, the sufficiency of the amount outstanding is put in issue by the plea of "never indebted." (9) The plaintiff's only proof of the sufficiency of the debt outstanding at the date of the demand, February 8, 1951, was the banker's admission—about £18. (10) There may be a dispute as to what is the amount outstanding in the account, and in that respect the customer bears the onus of proving that the amount outstanding is greater than the banker's admission by reason of deposits which the banker does not admit; and the banker bears the onus of proving that the amount outstanding is less than the amount proved by the customer to be outstanding. (11) To prove the total deposits to a current account which has admittedly been operated upon does not establish the amount outstanding at the relevant date. (12) The only evidence given in this case is the banker's admission, and that does not prove any sufficient amount.

If, on the other hand, the plaintiff may succeed by showing that there was at some time a loan of a greater sum than the amount demanded, he gave no evidence of such a loan. Proof of a series of independent loans would not support the plaintiff's claim unless those independent loans were related to the specific sum demanded. [Reference was made to *Foley v. Hill*,¹⁰ *London*

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¹⁰ (1848) 2 H.L.C. 28, 45.

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Joint Stock Bank v. MacMillan,¹¹ *Commissioner of Taxation v. English, Scottish and Australian Bank*,¹² *In re Hallett's Estate*,¹³ *Slingsby v. Westminster Bank Ltd.*¹⁴ and *Slingsby v. District Bank Ltd.*¹⁵] The Full Court below was in error in holding that a plea of "never indebted" did not put in issue the state of account between the parties as at the date of the demand for payment of the sums for which action was brought. Upon the pleadings it was necessary for the plaintiff to prove the state of account between him and the defendant bank, and the only proof given by him showed that there were insufficient funds in hand at the date of the demand to meet it.

K. A. Ferguson Q.C. (Australia) and *C. L. D. Meares* (Australia) for the plaintiff (respondent). The argument for the appellant has only touched on the real question which is raised in this case, namely, what are the real issues raised by a plea of "never indebted" when the action is for money lent—and this case was presented and fought as one for money lent and on no other basis. It is the pleadings which determine the issues; one looks at the whole of the record and the pleadings to see what is denied and what is admitted. The pleadings determine what evidence is material. The history of the plea "never indebted" is to be found in *Bullen & Leake*, 3rd ed., pp. 35–6. By virtue of the Common Law Procedure Act, 1852, there is only one form of indebitatus count—that in debt: *Bullen & Leake*, 3rd ed., pp. 460–4. The Rules made under the Act of 1852 have been adopted in New South Wales and now appear in rules 64–87 made under the Common Law Procedure Act, 1899 (N.S.W.). If the plea is "never indebted" all that the plaintiff has to prove is sufficient facts to establish that he entered into the contract; that the loan was made. The breach alleged is failure to pay on demand; so that what the defendant admits is, "I did not pay "on demand." If the defendant bank wishes to rely on any particular condition as a defence to an action, the plea of "never indebted" does not allow them to do so. The effect of rule 73 of the New South Wales Rules is that in every action of debt non-payment is conclusively presumed against the defendant unless it is proved. [Reference was made to *Smith v. Parsons*.¹⁶]

¹¹ [1918] A.C. 777, 814; 34 T.L.R. 509.

¹² [1920] A.C. 683, 687; 36 T.L.R. 305.

¹³ (1879) 13 Ch.D. 696, 728.

¹⁴ [1931] 2 K.B. 583, 591, 606; 47 T.L.R. 1.

¹⁵ [1932] 1 K.B. 544; 48 T.L.R. 114.

¹⁶ (1837) 8 C. & P. 199.

Every pleading must consist of allegations of fact and not of law: Bullen & Leake, 3rd ed., pp. 8-9. And a plea in denial admits the truth of every material allegation which is not denied. All that the court can do is to make a finding, yes or no, on the issue of fact and give judgment for the plaintiff or defendant accordingly: *Rance v. Kensett*.¹⁷ Whether money is owing can never be a question of fact simpliciter; it is a question of law depending on the findings made on the issues of fact raised. The facts which are inherently alleged in a common money count for money lent are: (a) that the money was lent; (b) that the defendant promised to repay; and (c) that the money, or any part of it, has not been repaid. A plea of "never indebted" denies the promise. The defendant bank say that they did not at any time promise to pay the money because the facts which the plaintiff alleges as giving rise to the promise never took place. They say that there are no facts from which the promise to repay can be implied. "Never indebted" would mean that they did not at any time promise to repay it—that plea would deny the promise. There is really no difference between a common money count and a special count for money lent. [Reference was made to *Beverley v. Lincoln Gas Light and Coke Co.*¹⁸] The plaintiff has sued on an implied contract, and this one is subject to conditions, but the defendant cannot rely on them unless he proves them, because otherwise it is conclusively presumed against them that by reason of the fact that the money was lent they promise to repay. The only issue is whether or not the money was lent—not the terms—because it is from that that the promise to repay arises.

The following heads of argument are submitted: (1) An indebitatus count lies whenever a simple contract, whether express or implied from the circumstances, results in a present debt or liquidated demand in money due on an executed consideration. (2) The contract sued upon must be one capable of giving rise to a debt payable at the time of action brought. (3) It is sufficient to state the cause of action by a general description, reserving the particular circumstances of the debt to be given in evidence: Bullen & Leake, 3rd ed., p. 35. (4) However complicated those circumstances may be, if they result in a presently payable simple contract debt, that debt may be recovered under an indebitatus count. (5) Whether the contract is express or implied the plaintiff may sue either on an indebitatus count or a special count. (6) If a special count is used it is necessary for the plaintiff to allege

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¹⁷ (1916) N.S.W. S.R. 285, 293.¹⁸ (1837) 6 Ad. & E. 829, 836.

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(a) the contract, (b) the performance of conditions precedent, and (c) the breach. (7) If an indebitatus count is used exactly the same facts are alleged in a concise form, (a) the contract, (b) the performance of conditions precedent, which is imported from the claim that the money is payable, and (c) the breach which is similarly imported. (8) (i) If the special count is used the general issue is "non assumpsit"; (ii) if the indebitatus count is used the general issue is "never indebted," and the two pleas raise precisely the same issues. (9) The only possible breach in an action for debt is non-payment, and that breach is conclusively presumed against the defendant unless he pleads payment. (10) If the defendant relies upon the non-performance of a condition precedent he must plead it: Bullen & Leake, 3rd ed., p. 147. (11) The general issue to the special count or indebitatus count denies merely the contract sued upon. (12) For a plaintiff to succeed, the facts alleged in the declaration must be true or admitted to be true on the pleadings. (13) If a condition precedent to the cause of action remains unperformed the plaintiff cannot succeed if that fact is raised on the pleadings. (14) If it is a condition precedent to payment and the contract sued upon is one capable of giving rise to a simple contract debt payable at the time of action brought, the non-performance of the condition must be specially pleaded. (15) If it is a condition precedent to a debt arising as distinct from a payable debt, or if the contract is one which could not give rise to a presently payable debt at the time of action brought, that may be shown under the general issue for the reason that such a contract would be inconsistent with the contract alleged in the declaration. [Reference was made to *Hudson v. Bilton*,¹⁹ *Pott v. Clegg*,²⁰ *Joachimson v. Swiss Bank Corporation*²¹ and *Stone v. Rogers*.²²]

"Never indebted" or non assumpsit cannot operate as a plea of payment. Payment must be specially pleaded. Looking at that count, any attempt by the defendant to say that at the time of the demand there were insufficient funds to meet it must amount to an allegation that they paid in law when they said that they did. That cannot be available on a plea of "never indebted" or "non assumpsit." Any plea, however it might be described, if it amounts to a plea of payment is a nullity in New South Wales without particulars, and, in any event, if it does amount to a plea of payment, it would be bad because a plea

¹⁹ (1856) 6 E. & B. 565.²⁰ 16 M. & W. 321.²¹ [1921] 3 K.B. 110.²² (1837) 2 M. & W. 443.

of payment must be specially pleaded. What the argument for the defendant bank amounts to is this: if money is lent to a banker and a cheque is dishonoured, the banker may say to the customer, it is for you to prove that I have not paid it or any part of it. And the argument is that they may raise that under a plea of "never indebted," which admits that they have not paid it or any part of it. [Reference was made to *Marzetti v. Williams*.²³] The defendant bank admits that the money was lent, that repayment was demanded, and, by the plea, that it had not been repaid. The order appealed against is right. The fact that there was sufficient money in the account to meet the demand has been proved by the plaintiff.

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Sir Garfield Barwick Q.C. in reply. It is contended positively :

(1) There cannot be a common money count for a loan until there is a presently payable debt. (2) If the count is not available, "never indebted" is the right plea, and that is said expressly in *Bullen & Leake*, 3rd ed., p. 463. (3) A common count is not a count upon the original contract out of which a presently payable debt arises. (4) It is a count upon a promise to pay which the law implies from the existence of a presently payable debt; in substance it is a count upon the debt. (5) Facts and circumstances led in evidence by the plaintiff in support of such a count must show a presently payable debt. Therefore, if conditions must be performed or events happen before the debt becomes presently payable, the plaintiff must show the performance or the happening. (6) The plea of "never indebted" denies all those facts and circumstances which the plaintiff must prove to establish the presently payable debt: rule 65. Therefore it puts the plaintiff to proof not merely of the contract, or the original contract, express or implied, out of which the debt arises, but to the proof of the performance of that contract. (7) By the plea a defendant says that there never was a time when the alleged debt was presently due and payable. (8) The matters which admit that the debt alleged was at one time presently due and payable but seek to avoid liability therefor must be specially pleaded: rule 67. (9) The difference between this situation and that arising under nil debet was that under nil debet the defendant, although admitting that there had been a presently payable debt as alleged, could show that he had ceased to be liable by reason of events subsequent to the time when the debt was presently payable.

²³ 1 B. & Ad. 415.

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The defendant in this case is content to stand on this; that a plaintiff in a common count must carry his proof to a presently payable debt. Here the plaintiff has to prove, as he alleged in the special count, that he withdrew £x and no more, so that there was sufficient to meet the cheques. That was his task, and he has failed in it.

[In addition to the cases already cited reference was made to *Smith v. Winter*,²⁴ *Seeger v. Duthie*,²⁵ *Bianchi v. Nash*,²⁶ *Broomfield v. Smith*,²⁷ *Arab Bank Ltd. v. Barclays Bank (Dominion, Colonial and Overseas)*²⁸ and *Hocking v. Bell*.²⁹]

Dec. 7. The judgment of their Lordships was delivered by LORD ASQUITH OF BISHOPSTONE, who stated the facts set out above and continued: The real issue raised by the events in this case was whether the eight suspect cheques were in fact forged or in fact genuine and authorized mandates to draw on the plaintiff's account, and it might not unreasonably have been expected that the parties, or that one of them on whom the onus lay, would give evidence in the box to deny or to affirm the authenticity of the signatures on these cheques of the plaintiff as drawer. However, in the events which happened the pleadings were so framed as, in the view of both parties, to make it unnecessary for either of them to give oral testimony at all. The case was made to turn on a point of pleading. This seems to their Lordships a regrettable development.

The case cannot be understood without bearing in mind that New South Wales has retained the system of pleadings which obtained in England before the Judicature Acts, in fact, that established under the Common Law Procedure Act of 1852; the provisions of which, and the Rules made thereunder, are in substance reproduced in the Common Law Procedure Act (New South Wales) of 1899, and the Rules made under that Act. In pursuance of this procedure the plaintiff, on March 1, 1951, filed a declaration based on the old "indebitatus assumpsit" count, in the following terms: "For money payable by the defendant " to the plaintiff for money received by the defendant for the use " of the plaintiff and for money payable by the defendant to the " plaintiff for money lent by the plaintiff to the defendant." And the plaintiff claimed the sum of £19,412 10s. 9d.

²⁴ (1852) 12 C.B. 487, 491.

²⁵ (1860) 8 C.B.(N.S.) 45, 55.

²⁶ (1836) 1 M. & W. 545, 546.

²⁷ (1836) 1 M. & W. 542.

²⁸ [1953] 2 Q.B. 527; [1953] 3 W.L.R. 67; [1953] 2 All E.R. 263.

²⁹ [1948] W.N. 21, 22.

It may be noted, though their Lordships are of opinion that this does not influence the result: (1) that there was a "variance" between the writ and the declaration, since the declaration relied on money had and received and money lent, and the writ, originally, on the former only. This was adjusted by an amendment at the trial, adding to the writ the words "for money lent by the plaintiff to the defendant and" before the words "for money received by the defendants to the use of the plaintiff . . ."; (2) that the particulars given under the writ as it originally stood, as particulars of money had and received, and stating that certain sums were subtracted from the plaintiff's account by forged cheques, could hardly stand as particulars of "money lent" after the writ was amended, except possibly as to the total specified of £19,412 10s. 9d. The amount "lent" to the bank might be measured or particularized by the gross amounts paid in, or by the credit balance at a given time, but assuredly not by the amounts (rightly or wrongly) debited to the account by the bank. However, no application was made, based on the insufficiency of the particulars in relation to the added claim for money lent, either for further and better particulars or for a stay or for an order to strike out the writ, and their Lordships think that nothing turns on this insufficiency.

To the declaration framed on the indebitatus count for money lent and money had and received the bank filed the plea of "never indebted." By his replication the plaintiff joined issue on this plea.

At the trial at Nisi Prius before McClemens J. and a jury of four, the jury, as already stated, having been dispensed with by consent at a certain stage, neither party gave or called oral evidence. The plaintiff, having called on the defendant bank to furnish a copy of his current account, tendered it (exhibit A) in evidence, and also relied on the letter of the defendant bank to the Bank of Australasia (p. 53, R.). The current account showed credits over a long period amounting in the aggregate to over £100,000, and debits which (including the eight disputed cheques) reduced the balance, as on February 8, 1951, to £18 odd. The letter from the defendant bank to the Bank of Australasia, dated February 12, 1951, reads as follows:—

"DEAR SIR,

"W. R. J. Laing.

"With reference to certain cheques itemized hereunder, bearing date February 8, 1951, drawn by W. R. J. Laing, presented by you for payment and returned to you herewith with the answer

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“ ‘ Refer to drawer—bona fide dispute state of account arising
“ ‘ alleged forged cheques ’ indorsed thereon, we advise that
“ ‘ certain funds which the drawer may have considered were at
“ ‘ his disposal and which would have been sufficient to meet such
“ ‘ cheques are the subject of a bona fide dispute arising out of
“ ‘ alleged forgeries.

“ No.	841474,	for	£2,950
“ ”	841471,	„	2,950
“ ”	841473,	„	2,210 18s. 9d.
“ ”	841472,	„	2,950
“ ”	841475,	„	2,338 0s. 8d.
“ ”	841476,	„	890 15s. 8d.
“ ”	841477,	„	2,225 5s. 4d.
“ ”	841478,	„	2,897 10s. 4d.

“ ‘ You are authorized to communicate this information to your
“ ‘ client.’ ”

These documents were tendered by the plaintiff and admitted in evidence (together with other letters which are immaterial to the issue. The letters are to be found in the record under the heading “ exhibit B ”). The plaintiff also tendered the eight cheques of February 8, 1951 (exhibit C), referred to in the letter of February 12, 1951, solely as evidence of a “ demand,” which under the decision of the English Court of Appeal in *Joachimson v. Swiss Bank Corporation*¹ is an essential precondition of a customer’s cause of action when suing a bank for a debt due from it in respect of a current account. It is clear that the plaintiff relied on exhibits A, B and C cumulatively as admissions by the bank sufficient to entitle him to succeed. The argument is somewhat elliptically recorded, the formula “ argument ensued ” occurring repeatedly. Plaintiff’s counsel seems to have claimed in the court of first instance (as he certainly did on appeal to the Full Court) that he had paid money into his current account in excess of the sum claimed and that the last-named sum had been demanded by the cheques of February 8, 1951, for £19,412. Defendant’s counsel, at the close of the plaintiff’s case, asked for a non-suit, but this issue was neither argued nor persisted in, since defendant’s counsel resiled from it and proceeded to ask instead for a “ direction verdict,” viz., a direction to the jury that the plaintiff had made out no case. Defendant’s counsel proceeded to argue that on February 8, 1951, there were no funds in the plaintiff’s account sufficient to meet the eight cheques then

¹ [1921] 3 K.B. 110; 37 T.L.R. 534.

presented. Counsel for the plaintiff then, as already indicated, asked for leave to amend the writ (which had been limited to "money had and received") so as to read "amount due by the defendant to the plaintiff for money lent by the plaintiff to the defendant and for money had and received by the defendant and dealt with in the manner following:—." Then followed particulars of the eight cheques said to have been forged. Counsel for the bank did not oppose this amendment, subject to costs. Counsel for plaintiff made it clear that he was not suing for the dishonour as such of these eight cheques. He merely relied on the presentation of another eight cheques of the same amounts on February 8, 1951, as a "demand."

The jury were then discharged by consent and the judge, on May 20, 1952, gave judgment for the plaintiff, having reached the conclusion that he could not have directed a jury that the plaintiff had made out no case. After observing that the real issue in the case, viz., the genuineness vel non of the eight (earlier) cheques had been burked or evaded by the parties and that the result of their doing so was to reduce the issue in the main to a technical point of pleading, he proceeded to summarize the arguments presented before him and to hold that there was some evidence (on the pleadings as they stood) to submit for consideration by a jury that "money was lent, that the money was "demanded back, and . . . has not been paid" (R., p. 14). The judge indicated that in his view the proper plea in such a case as that before him was not "never indebted" but "payment:" an issue which loomed large in the decision, later on, of the Full Court of the Supreme Court. It would seem to follow from this opinion that in the absence of a plea of "payment" no evidence could be given of drawings on the account which would in law amount to part repayments of the loan or loans. Notwithstanding this, the judge, as reported (R., pp. 12 and 13), disagreed with the plaintiff's submission that, while the credit items in the account are admissions by the bank and evidence for him, the debit items are "not evidence for the bank, or against" the plaintiff; and says that the plaintiff, having put in this document, must take the document as it stands as a whole. Yet when on the second day of the hearing the bank puts forward this contention he appears to reject it, and adheres to the decision which he had adumbrated in favour of the plaintiff, basing himself on (1) the presentation of the eight cheques on February 8, 1951, and the notation of the bank thereon, (2) the bank's letter of February 12, 1951, as affording some evidence, on the pleadings

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as they stood, to go to a jury that money was "lent, demanded " back, and not repaid." He seems at this stage to have treated the account, of which he had ruled that both sides—debits as well as credits—were equally valid and binding, either as affording no evidence in favour of the bank, or as affording no evidence in favour of either party.

Counsel for the plaintiff does not seem to have relied exclusively on these factors, (1) and (2), either before the trial judge or the Full Court. He relied also on the account, exhibit A. He alleged, in effect, that, on the common count for " money lent," the money lent was represented by the gross payments into the credit side of his account, and that this, plus a demand for an amount not exceeding the payments in, was (on a plea of " never " indebted ") the sole precondition of the bank's liability to repay him that amount. He argued further that the only matters which could be raised in answer to such a claim under the plea of " not indebted "—the only plea entered in this case—were either that the money was not " lent " (in the sense above indicated) or that no demand was made. On a plea of " payment " the depletion of the account by authorized withdrawals could be proved, but not under a mere plea of " never indebted."

The judge, having decided for the plaintiff on the ground indicated, the defendant, by notice of appeal filed on May 28, appealed to the Full Court of the Supreme Court of New South Wales (Street C.J., Owen and Herron JJ.).

In his judgment (with which in substance, though not in detail, the other two judges agreed), Street C.J. accepted the submission that on an indebitatus count for money lent, to which " never " indebted " and nothing else was pleaded, the onus on the plaintiff is as follows: " Coming now to the pleadings in the action, " the relationship of the parties being that of creditor and debtor, " the cause of action was properly framed as an action in debt in " the form of a count for money lent. To this count there might " be many and various defences, but the only plea put on the file " was one of ' never indebted ' and this defined the issue between " the parties. The count for money payable for money lent " involves the allegation that money was in fact lent to the defend- " ant under a contract, express or implied, in terms capable of " giving rise to a presently payable debt, and it involves also the " allegation that in fact the money was payable at the time when " the action was brought. The plea of ' never indebted ' in the " case of an express contract denies the contract of loan, that " is, it denies that the money was lent on a promise *capable of*

“ *requiring repayment at the date when the action was brought.*

“ [The italics are their Lordships’.]

“ In the case of an implied contract, such as the present, which arises out of the proved relationship of banker and customer, it denies the matters of fact from which a promise to repay was capable of being inferred. In other words, it denies the loan, and nothing more. Though the money is owed by the bank when it has been received from the customer, it is not in fact repayable until demand is made, but the assertion of the making of the necessary demand is contained in the allegation that the money was ‘payable,’ as this performs the same function as the allegation in a count framed in assumpsit that ‘all conditions were fulfilled and all things happened and ‘all times elapsed necessary to entitle the plaintiff’ to sue. A plea of ‘non assumpsit’ does not put this allegation of performance of conditions precedent in issue any more than it puts in issue the breach alleged. No question arises here, however, in this respect, as the respondent in fact proved the demand, and having proved the relationship of banker and customer and the deposit of large sums of money, far more than sufficient to meet the cheques of February 8, 1951, he thereby provided prima facie proof of a debt payable at the time of action brought. . . .

“ The bank now argues that the respondent, having put in evidence the whole of the bank’s statements relating to his account, both the credit and the debit sides, he must fail because he has proved that at the date of the demand the bank only owed him a balance of £18. The appellant’s argument is that the bank’s statement shows that there was not sufficient money owing to the respondent at the crucial date to meet the cheques drawn on February 8, 1951. This argument is fallacious. Constant reference was made to the balance shown in the books of the bank on February 8, but this means nothing by itself. It does not represent a deposit by the respondent nor a payment by the bank. It is merely the arithmetical result of a mechanical addition of both the debit and the credit entries, and is a mere summary of the arithmetical effect of those entries. It results from the fact that the books purport to show that while large sums have been paid in by the respondent, other large sums have also been paid out to him by the bank, and the balance is reached by reason of the assertion that, while the bank admits receiving money, it also paid out to the respondent practically the same total as that paid in. It is true that

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“ there are cases where both sides of an account, even if tendered
“ by a party for the purpose of using one side only, must be taken
“ into account also in favour of the other party; but these are
“ cases where both sides of the account are relevant to the issues
“ raised between the parties by the pleadings. . . .

“ The plea which was filed denying the loan by the respondent
“ is, on the bank's own books, admittedly unsupportable, for they
“ record the payments to the bank relied upon by the respondent.
“ To seek to assert that, despite these substantial payments to
“ the bank, only £18 was owed on February 8, 1951, involves
“ necessarily the assertion that money had been repaid to the
“ respondent in such amounts as to reduce his credit balance to
“ that figure.”

The gist of this judgment is that the implied contract between customer and banker is to this extent on all fours with the contract between any other creditor and debtor; each payment into the account is a loan and creates a debt. The plea “ never “ indebted ” merely puts in issue the payments in—the credit side of the account.

It is true that the debtor bank may prove, if it can, that the amount credited has been reduced by authorized withdrawals to vanishing point (or, in the case of an overdraft, below that point) and that it suffices for a bank, refusing to meet a demand for £x, to show that by the time of the demand it has thus been reduced to a point where it falls short of £x. But, so the argument runs, the bank must, in order to prove this, set up a plea, not of “ never “ indebted,” but of “ payment ”—the appropriate plea where a debt is alleged to have been repaid in part or in whole, and no such plea was set up in this case originally, nor was any request for leave to amend in that sense ever asked for, though it would have been granted on terms, as certainly as the plaintiff's amendment of his writ.

The relevant Rules under the Common Law Procedure Act of New South Wales may here with advantage be set out:—

“ Rule 64. In all actions on simple contract, except as herein-
“ after excepted, the plea of non assumpsit, or a plea traversing
“ the contract or agreement alleged in the declaration, shall
“ operate only as a denial in fact of the express contract, promise,
“ or agreement alleged, or of the matters of fact from which the
“ contract, promise, or agreement alleged may be implied by law.

“ Exempli gratia.—In an action on a warranty, such pleas
“ will operate as a denial of the fact of the sale and warranty
“ having been given, but not of the breach; and, in an action on

“ a policy of insurance, of the subscription to the alleged policy
 “ by the defendant, but not of the interest, of the commence-
 “ ment of the risk, of the loss, or of the alleged compliance with
 “ warranties.

“ In actions against carriers and other bailees for not delivering
 “ or not keeping goods safe, or not returning them on request,
 “ and in actions against agents for not accounting such pleas will
 “ operate as a denial of any express or implied contract to the
 “ effect alleged in the declaration but not of the breach.

“ Rule 65. To causes of action to which the plea of ‘ never
 “ ‘ was indebted ’ is applicable, as provided in the Third Schedule
 “ to the Common Law Procedure Act, 1899, and to those of a
 “ like nature, the plea of non assumpsit shall be inadmissible,
 “ and the plea of ‘ never was indebted ’ will operate as a denial of
 “ those matters of fact *from which the liability of the defendant*
 “ *arises*. [The italics are their Lordships’.]

“ Exempli gratia.—In actions for goods bargained and sold,
 “ or sold and delivered, the plea will operate as a denial of the
 “ bargain and sale, or sale and delivery, in point of fact; in the
 “ like action for money had and received, it will operate as a
 “ denial both of the receipt of the money and the existence of
 “ those facts which make such receipt by the defendant a receipt
 “ to the use of the plaintiff.

“ Rule 67. In every species of action on contract, all matters
 “ in confession and avoidance, including not only those by way
 “ of discharge, but those which show the transaction to be either
 “ void or voidable in point of law, on the ground of fraud or
 “ otherwise, shall be specially pleaded.

“ Exempli gratia.—Infancy, coverture, release, payment, per-
 “ formance, illegality of consideration either by statute or common
 “ law, drawing, indorsing, accepting, etc., bills or notes by way
 “ of accommodation, set-off, mutual credit, unseaworthiness,
 “ misrepresentation, concealment, deviation, and various other
 “ defences must be pleaded.

“ Rule 73. Payment shall not be received in evidence, in
 “ any case in reduction of the debt or claim, without a plea of
 “ payment. Provided that in respect of any sum for which the
 “ plaintiff has specifically given credit in his particulars of demand,
 “ or in the special indorsement, if any, on the summons, no such
 “ plea shall be necessary.”

The case seems to their Lordships to depend on the answer to
 two questions: A. What does a plea of “ never indebted,” and
 what does it not, put in issue? In particular, does it put the

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plaintiff to proof of the performance of conditions precedent to the present payability of the debt? B. Whatever onus it throws on the plaintiff, did the plaintiff discharge that onus in this case?

On these issues their Lordships are indebted to counsel on both sides for much interesting and helpful argument.

A. As to the first issue, there is curiously little English case law which is directly in point. In the third edition of Bullen and Leake on Precedents of Pleadings, of 1868, at the top of p. 463, the following passage occurs under the heading of "Indebitatus counts": "If the plaintiff relies on an express contract which was subject to any conditions before the absolute liability of the defendant attaches, he is bound to prove under an issue raised by this plea the happening or performance of those conditions." And cf. *ibid.*, pp. 35-7 and p. 462.

The principle here stated was applied by cases such as *Hudson v. Bilton*² and *Broomfield v. Smith*.³ In *Hudson v. Bilton*² a liquidated sum in money was payable when a certain ship "sailed." The count was an *indebitatus* count, and the plea was "never indebted." The ship was put out over the bar and put back, the captain being still ashore. The question was whether this amounted to her "sailing." The plaintiff failed because on those facts he did not establish that the ship had sailed; but this decision clearly assumed that proof of this fact, on the pleadings, rested on him. In *Broomfield v. Smith*³ there was an *indebitatus* count for the price of goods sold and delivered and a plea of "never indebted." There was no plea in confession and avoidance. The sale and delivery were proved, but there was a term in the contract that the goods were sold on a period of credit, and at the time of the claim this period was unexpired. The plaintiff succeeded before the court of first instance, but failed on appeal, because the expiration of the period of credit was held to be a condition precedent to his cause of action and he had not established it. If the plaintiff's proposition had been well founded the defendant could not have succeeded on a plea of "never indebted," because performance of the conditions precedent (in this case expiration of the period of credit) would have been presumed in his favour. (See also *Scott v. Parker*,⁴ where it is true the plea was *non assumpsit*, though the count was an *indebitatus* count, and *Simmons v. Swift*.⁵)

Their Lordships are of opinion that not only these cases but the wording of rule 65 make it plain that on an issue of "never

² (1856) 6 E. & B. 565.

³ (1836) 1 M. & W. 542.

⁴ (1841) 1 Q.B. 809.

⁵ (1826) 5 B. & C. 857.

“indebted” the onus of proving the fulfilment of conditions precedent is on the plaintiff. They think that the words at the end of rule 65, “from which the liability of the defendant arises” (contrasting with the wording of the preceding rule), are significant.

The judgment of Street C.J. in effect holds that in such circumstances proof of the performance of conditions precedent to a presently payable debt is not on the plaintiff. His language, when he speaks of a “contract capable of giving rise to a presently payable debt,” implies in the plaintiff’s favour the presumption that a potential debt has, through fulfilment of conditions precedent, become an actual one. Their Lordships venture, with great respect, to think that this is a misconception of the onus of proof on the pleadings as they stood in this case. The plaintiff must prove that the potential liability has ripened into an actual and present one.

The question what it is that the plea of “never indebted” to an indebitatus count puts in issue can be approached on different lines. What is, for this purpose, a “debt” (the debt which is denied)? No doubt for some purposes and in some sense if B has lent £5 to A and A is under an obligation to repay B £5 in a week from now, this is in the interval a debt in the sense of debitum in praesenti, solvendum in futuro. But is this the type of debt to which the indebitatus counts are directed? Their Lordships think not. The counts are directed to a debt solvendum in praesenti—a debt “presently payable”—and it is such a debt which the plea “never indebted,” filed in answer to an indebitatus count, denies and puts in issue. A common money count is not available unless the debt is presently payable, and “never indebted” puts in issue its present payability. This plea does not put in issue the original contractual promise, which may have been subject to a condition precedent. It puts in issue the promise implied by law to pay presently, which only arises if and when such conditions have been performed, and consequently, as the two cases cited above show, puts in issue the performance of those conditions and puts the proof of these on the plaintiff. (This is borne out by the language of rule 65.) In a customer and banker case one such condition precedent is the existence in the customer’s account of funds sufficient to meet the demand on them. It is for the customer to establish this sufficiency as subsisting at the time of demand.

Their Lordships are fortified in the belief that this view is sound by the formulation by counsel for the plaintiff of the “special” count which would in the circumstances of this case

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have been appropriate if an indebitatus count had not been resorted to. It reads as follows: "The plaintiff sues the defendant for that the plaintiff lent to the defendant £100,000 and "the defendant promised that it would pay to or to the order of "the plaintiff such sums as the plaintiff might from time to time "demand, provided that at the time of any such demand there "were sufficient funds in the plaintiff's account to meet the same. "And the defendant paid the plaintiff, on the demand of the "plaintiff from time to time, certain specific sums *and no more*; "so that at the time of the demand hereinafter referred to, there "were left in plaintiff's account more than sufficient sums to "meet the said demand and the plaintiff demanded £19,000 from "the defendant which defendant has not paid nor has he paid "any part of it."

Such is the obligation where it is pleaded on a special assumpsit.

Their Lordships are of opinion that whether or not an indebitatus count is used to recover money lent, where the creditor is a customer and the debtor a bank on current account, the "peculiar incidents" of that relationship govern the legal position and determine what the plaintiff must prove. This is admitted as regards the necessity of demand: a requirement which, in the absence of special agreement, does not attach where an ordinary creditor-debtor relationship exists, and the debtor must "seek "out" his creditor. But a further "peculiar incident" is that the bank is only indebted to the customer for the amount (which may be called "a balance" when it is arrived at by deducting authorized withdrawals from sums paid in) standing to his credit as at the time of demand. Of course, if the customer can prove that at this time the "balance" suffices to pay his demand, he succeeds. If the "balance" falls short of doing so, even by a penny, he fails altogether, another distinction which rails off the creditor-debtor relationship in the case of a customer and banker from that relationship in other cases.

B. On this footing, did the plaintiff discharge the onus on him? Their Lordships consider that he did not. If he had gone into the box and sworn that the eight disputed cheques were forged, and had been believed, he would unquestionably have discharged it. He would equally have shifted the onus to the bank if he had gone into the box and testified that only cheques A, B and C drawn on the account were genuine and that after deducting these there were still sufficient funds to meet the demand. He did neither. The only evidence before the court

consisted of two documents: (i) the current account, produced by the bank; (ii) the bank's letter to the Bank of Australasia. Neither of these documents in themselves, nor the two in combination, amount to an admission by the bank that at the date of demand, February 8, 1951, the plaintiff's account contained sufficient funds to meet the demand for £19,412 odd.

In these circumstances their Lordships have no choice but humbly to advise Her Majesty that the appeal should be allowed. In so doing they cannot repress a regret that a matter of substance should have been allowed to turn on a question of technical form.

The plaintiff-respondent should pay the costs of this appeal and of the proceedings in the Australian courts.

Solicitors: *Bell, Brodrick & Gray; Blyth, Dutton, Wright & Bennett.*

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[HOUSE OF LORDS.]

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ATTORNEY-GENERAL AND OTHERS . . . RESPONDENTS. 1953

June 30;
July 1, 2,
6, 7;
Nov. 12.

International Law — Marriage — Validity — Retroactive foreign law — Religious ceremony invalid by Austrian law — Retroactive Austrian law validating marriage on registration — English domicile acquired meanwhile — Registration of Austrian marriage ceremony — Subsequent English marriage ceremony between one of parties and another person — Child previously born to them — Whether legitimated.
Legitimacy.

The parents of the petitioner, who was born in England in March, 1949, went through a ceremony of marriage there in 1950. The petitioner's mother had, however, gone through a previous ceremony of marriage in a Roman Catholic church in Austria in May, 1945, with another person, both the parties being Poles then domiciled in Poland. At that time Austrian law only recognized as valid marriages celebrated at civil registries, but by a law which came into force in June, 1945, provision was made for the validation of other ceremonies by registration. The ceremony of 1945 was registered by the Austrian authorities in July, 1949, without the knowledge of the wife, who had come to England in 1946 and acquired an English domicile:—

* *Present:* LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER, LORD ASQUITH OF BISHOPSTONE and LORD COHEN.

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Held, that the English marriage ceremony was invalid, since at the time it was celebrated the previous marriage celebrated in Austria had been already validated by the laws of that country; the petitioner was therefore illegitimate.

The validity of a marriage is governed by the *lex loci celebrationis* and, irrespective of domicile or nationality, the English courts will recognize retroactive legislation of foreign States validating informal marriages contracted within their jurisdiction.

Quaere, whether the English marriage would have been valid if contracted before the Austrian validating legislation or before the registration.

Decision of the Court of Appeal [1952] P. 302; [1952] 2 T.L.R. 606; [1952] 2 All E.R. 616 affirmed.

APPEAL from the Court of Appeal (Somervell, Denning and Romer L.JJ.).

This was an appeal from an order of the Court of Appeal dated July 30, 1952, dismissing an appeal from an order of the Probate, Divorce and Admiralty Division (Divorce) of the High Court of Justice dated February 18, 1952, whereby it was pronounced that the marriage of Henryka Antonia Starkowska (born Juszczkiewicz) and Mieczyslaw Starkowski (parents of the appellant Krzysztof Jerzy Mieczyslaw Starkowski, otherwise Urbanski, otherwise Juszczkiewicz) at the Register Office, Croydon, in the County Borough of Croydon, on February 11, 1950, was not a valid marriage and that the appellant was not legitimated for the purpose of the Legitimacy Act, 1926.

The facts, stated by Lord Reid and Lord Tucker, were as follows: By a petition under the Legitimacy Act, 1926, and section 17 of the Matrimonial Causes Act, 1950, the infant appellant, suing by his mother as his next friend, sought a declaration that his mother and Mieczyslaw Starkowski were lawfully married on February 11, 1950, at the Register Office of Croydon in the county of Surrey and that by that marriage he became legitimated as from the date of the said marriage. The Attorney-General was made respondent to the proceedings and Mieczyslaw and one Ryszard Urbanski and Barbara Urbanska were parties cited. The petitioner and parties cited were of Polish nationality, and for convenience they were referred to in the courts below by the anglicized versions of their Christian names. The infant petitioner was called Christopher, his mother Henryka, and his father, one of the parties cited, Michael. The other parties cited were called Richard and Barbara.

Henryka and Richard were born in Cracow in Poland and lived there until the autumn of 1944, when they moved to

Kitzbühel in Austria but remained domiciled in Poland. Henryka was then pregnant by him. They were both Roman Catholics and anxious to be married in a church by a priest. Owing to the German occupation of Austria there were difficulties in their way and the priest at Kitzbühel at first refused to marry them, but when the Germans were driven out there was much confusion and he eventually agreed to do so on May 19, 1945, when they went through a ceremony of marriage according to the rites of their Church in the parish church at Kitzbühel. On June 12, 1945, Barbara, the third party cited, the child of that union, was born. On June 16, 1945, she was registered as an illegitimate child, but on July 15, 1945, was baptized as legitimate. Richard and Henryka lived together as man and wife until 1947, when they separated. In July, 1945, they had left Austria with Barbara for Italy, and in the autumn of 1946 they arrived in England.

Towards the end of 1947 or early in 1948 Henryka met Michael, also a Pole, and on March 27, 1949, she gave birth to the petitioner Christopher, of whom he was the father. On February 11, 1950, Henryka went through a form of marriage with Michael at the Register Office in Croydon, he being a bachelor and having by that time acquired an English domicile. Barnard J. found as a fact that, assuming she was a feme sole when she came to England, Henryka had also by that time acquired a domicile in this country.

The judge accepted the evidence of three expert witnesses to the effect that by the German marriage law which was still in force at Kitzbühel on May 19, 1945, the religious ceremony which Richard and Henryka went through on that date did not constitute a valid legal marriage, the law of Austria having been changed during the German occupation to require a civil ceremony. On April 27, 1945, Austria had been liberated, but by an Order of the Provisional Government published on May 1, 1945, although certain of the German laws were repealed, the marriage law was for the time being confirmed.

On June 26, 1945, the Austrian Provisional Government published Order No. 31, to come into force on June 30, 1945. The relevant sections were as follows:—

Section 3: “ (1) Marriages which were solemnized during the
 “ period from April 1, 1945, to the coming into force of this law
 “ before incompetent lay authorities or before ministers of a
 “ recognized church or religious community have the effect of a
 “ marriage solemnized at a Register Office in accordance with

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“ sections 15 *et seq.* of the Marriage Law of July 6, 1938, as
 “ from the day of solemnization as soon as they have been
 “ registered in the Family Book kept by the Registry Office. (2)
 “ The offices in which such marriages have been solemnized shall
 “ forward without delay to the Register Office which would have
 “ been competent to solemnize the marriage at the time of its
 “ solemnization in respect of the bridegroom, true copies of the
 “ entries made in their marriage register showing exactly the
 “ words, figures and letters.”

Section 5 (1): “ The Register Offices are to enter in their
 “ register the occurrences affecting personal status communicated
 “ to them in accordance with sections 3 and 4.”

Section 4 was a section dealing with the registration of births
 and deaths.

For reasons which were not explained, owing to some over-
 sight, the particulars of the ceremony of May 19, 1945, were not
 forwarded and it was not registered in accordance with sections 3
 and 5 until July 18, 1949. It was admitted that before that date
 the law of Austria would not have regarded the parties as married,
 but that after that date it would have regarded them as married
 and as having been validly married on May 19, 1945.

Accordingly, the question for decision was whether immedi-
 ately before the ceremony at Croydon on February 11, 1950,
 Henryka was or was not already validly married to Richard
 according to private international law as applied by the courts
 of this country. Barnard J. answered that question in the
 affirmative, rejected the petition of the petitioner, and declared
 that the marriage solemnized on February 11, 1950, was not a
 valid marriage and that the petitioner Christopher, born on
 March 27, 1949, was not legitimated for the purpose of the
 Legitimacy Act, 1926. That decision was confirmed by the Court
 of Appeal.

The appellant appealed to the House of Lords.

Heathcote-Williams Q.C. and *Dobry* for the appellant. This
 is a petition for a declaration of legitimacy under the Legitimacy
 Act, 1926, and the Matrimonial Causes Act, 1950, s. 17.

In considering the validity of the first marriage ceremony the
 crucial moment at which to examine the law of the country where
 it took place is the moment of that marriage ceremony. This
 case must be determined on the state of the Austrian law at that
 date, and the courts in England will not recognize the subsequent
 ratification. The law prevailing in Austria at that time is the

only one relevant to determine whether or not that ceremony was valid. The law next day or 25 years later is not relevant, since it is essential that the state of marriage should be determined with certainty, and if it were otherwise people would never know whether the country where they went through an invalid marriage ceremony might not pass retrospective legislation validating it. In holding that the law of the place of celebration need not be restricted to the law as it stood at the date of the ceremony, the Court of Appeal failed to apply the principle that status and capacity to marry are governed exclusively by the law of the domicile: *Udny v. Udny*.¹ Status is more than a contractual relationship to which something is added by the authority of the State. See also *Salvesen (or Von Lorang) v. Administrator of Austrian Property*,² *Keyes v. Keyes*³ and *In re Luck's Settlement Trusts*.⁴ In the last-named case, which the appellant strongly relies on, it is clear from the judgments that the Court of Appeal would not have recognized the power of foreign legislation to effect retrospectively the status of a person at the time when his status was subject only to the law of England. In private international law the courts of one country will not recognize the extraterritorial effect of a foreign statute on the status of a person neither domiciled in nor a subject of the legislating State. A sovereign State, while it can make laws which can govern persons within its jurisdiction, cannot affect the status of persons outside its jurisdiction. Foreign retrospective legislation validating marriages is repugnant to English public policy, which is a factor to be accorded weight in framing the rules of English private international law and adapting them to fresh sets of facts.

English law does not recognize the status of a putative wife or the state of being unmarried and yet not free to marry. No principle should be recognized which might result in someone who is at a given time unmarried knowing that he is liable to become married retrospectively. So it would be wrong to hold that Henryka, when she reached England, was a person who was not married but whose status could be changed into that of a married woman without her consent: see *Chetti v. Chetti*⁵ and *MacDougall v. Chitnavis*.⁶

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¹ (1869) L.R. 1 Sc. & D. 441, 442, 457.

² [1927] A.C. 641, 662; 43 T.L.R. 609.

³ [1921] P. 204, 215, 217; 37 T.L.R. 499.

⁴ [1940] Ch. 323; 56 T.L.R. 333; [1940] 1 All E.R. 375; (C.A.) [1940] Ch. 864, 879; 56 T.L.R. 915; [1940] 3 All E.R. 307.

⁵ [1909] P. 67; 25 T.L.R. 146.

⁶ 1937 S.C. 390, 402.

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Austrian law could not have the extraterritorial effect of depriving Henryka's child of his rights under the Legitimacy Act at a future date. His status cannot be invaded by a retrospective law which deprived him of the potentiality of being legitimated.

Consent is an essential element to marriage, and it does not appear that it was present in this case. In the first place, when persons go through a ceremony which they know not to be legal they cannot be said to consent to marry. Accordingly there is insufficient evidence that Henryka consented to marry at the Kitzbühel ceremony. Further, even though the parties might have consented to be married before the priest at Kitzbühel, there was nothing to show that the essential ingredient of consent was still operating afterwards, and, accordingly, the validating law was irrelevant, for such foreign retrospective legislation will only be recognized if the parties consent to its operation. There is no evidence that Henryka consented to the registration of the marriage.

The observation of Viscount Haldane in *Salvesen (or Von Lorang) v. Administrator of Austrian Property*,⁷ referring to "later French law," is in the nature of a dictum and, in any event, it is not to be inferred from it that he considered that in that case retrospective legislation would have altered the situation in that case.

In *Doe dem. Breakey v. Breakey*⁸ the observations of Robinson L.J. were obiter dicta and should not be treated as having persuasive authority. That case was decided before the rule that matters of status are governed by the law of the domicile was established. Likewise the decision in *Luna c. Godin*⁹ affords no assistance here, for it depends on French rules as to conflict of laws, which differ from English rules. It has neither binding nor persuasive authority.

*Lynch v. Provisional Government of Paraguay*¹⁰ and *Swift v. Attorney-General for Ireland*¹¹ are relied on.

[*Berthiaume v. Dastous*¹²; *Bank voor Handel en Scheepvaart N.V. v. Slatford*¹³; *Scott v. Attorney-General*¹⁴; *In re Aganoor's Trusts*¹⁵; *Sottomayor v. De Barros*¹⁶; *Brook v. Brook*¹⁷; *Hyde*

⁷ [1927] A.C. 641, 651.⁸ (1846) 2 U.C.R. 349, 357.⁹ (1881) 10 Clunet 621.¹⁰ (1871) L.R. 2 P. & M. 268.¹¹ [1912] A.C. 276, 278, 279; 28 T.L.R. 199.¹² [1930] A.C. 79; 45 T.L.R. 607.¹³ [1951] 2 T.L.R. 755, 756; [1951]

2 All E.R. 779.

¹⁴ (1886) 11 P.D. 128, 131.¹⁵ (1895) 64 L.J.Ch. 521.¹⁶ (1877) 3 P.D. 1.¹⁷ (1861) 9 H.L.C. 193.

*v. Hyde*¹⁸; *Nachimson v. Nachimson*¹⁹; *Apt v. Apt*²⁰; Colonial Marriages Act, 1865 (28 & 29 Vict. c. 64); Greek Marriages Act, 1884 (47 & 48 Vict. c. 20); Marriages in Japan (Validity) Act, 1912 (2 & 3 Geo. 5, c. 15); Kenya Divorces (Validity) Act, 1922 (12 & 13 Geo. 5, c. 10), and Halsbury's Laws of England, 2nd ed., Vol. XVI, p. 597, note (k), were also referred to.]

Dobry following. The Court of Appeal was wrong in holding that a different and more difficult question would have arisen if the English ceremony had taken place before the Austrian ceremony had been registered, since the appellant's birth, which occurred before the registration, was, in either case, an event of precisely similar significance, so that the question must be decided on the same grounds of principle. It is essential to the appellant's case that it should be decided whether or not there is a half-way house. One must either accept or reject the retrospective change of Austrian law.

The reason why the test of the *lex loci celebrationis* as to formalities of marriage has been retained in England is not the comity of nations; it is a matter of manifest convenience: see *Warrender v. Warrender*²¹; *Scrimshire v. Scrimshire*²²; *Middleton v. Janverin* (orse. *Middleton*),²³ *Guepratta v. Young*.²⁴ The recognition of the *lex loci celebrationis* should not be extended to the retrospective validation of a marriage in the present circumstances, because the validating law deals not only with formalities but also with essentials or capacity. Laws dealing with the two are to be distinguished: see Dicey on Conflict of Laws, 6th ed., p. 758, r. 168; p. 786, r. 169. This validating law, if recognized, would affect the civil rights of parties subject to the law of England who had at the time the marriage was registered no connexion whatever with the law of Austria. Once the Austrian law was allowed to interfere with the rights of persons domiciled here it would violate the principle that the law of domicile governs essentials as opposed to forms, since it might result in a person's status being changed from single to married.

Simon Q.C. and *P. Colin Duncan* for the respondents. Two questions arise in the present case: (1) Does the Austrian Order No. 31 affect the marriages of any persons other than Austrian

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GENERAL.¹⁸ (1866) 35 L.J.Mat. 57.¹⁹ [1930] P. 217, 236-7; 46 T.L.R. 444.²⁰ [1947] P. 127; 63 T.L.R. 223; [1947] 1 All E.R. 620; (C.A.) [1948] P. 83; 63 T.L.R. 618; [1947] 2 All E.R. 677.²¹ (1835) 2 Cl. & F. 488, 529.²² (1752) 2 Hag.Con. 395, 419.²³ (1802) 2 Hag.Con. 437.²⁴ (1854) 4 De G. & S. 217, 227-8.

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Granted that *prima facie* it should be accepted, should it nevertheless be rejected in so far as it operates to derogate from a status already acquired in such a way as to cause injustice? The principle applicable is that a foreign Act of the legislature of the place of celebration of a marriage which validates a marriage quoad formalities will be recognized and given effect to by English law save in so far as it alters or derogates from the acquired status of some other persons to their detriment.

The same problem arises in connexion with English validating Acts, and it is inherently desirable that any validating Act should have extraterritorial validity.

It might be that the English courts in dealing with a foreign Act validating marriage would say that no such Act can have any extraterritorial effect at all, but that would be impossible because it would amount to a denial of private international law. Or they might recognize foreign retrospective legislation subject to qualifications and exceptions, e.g., that if before it took effect one of the parties had entered into another marriage a different rule would apply, or it might not have effect if an English court of competent jurisdiction had decided that either party was unmarried. In the present case the alternatives lie between saying (1) that Order No. 31, being a law of the place of celebration validating a marriage quoad formalities, it should be accepted and recognized save in so far as it destroys the status of a person to his detriment; or (2) that one should look either to Polish law, as being the personal law of the parties at the date of the celebration of the marriage, or to English law, as the law to which they were subject at the date of the registration. On these points see Story's *Conflict of Laws*, 8th ed., p. 29, section 29, and *Brook v. Brook*.²⁵ The fact that the courts of England give international effect to validating Acts of the British Parliament suggests that principles of private international law are applicable to this matter. The rule applicable is that a foreign validating law is recognized if it validates a marriage qua formalities and is a law of the place of celebration, but if it validates qua capacity it is only recognized if it is a law of the place of domicile. In this case the law applicable is Austrian law as amended down to February 11, 1950, and the question as to the validity of the formalities must be answered according to that law.

²⁵ 9 H.L.C. 193, 207-8.

Five points bear on this: (1) A marriage is invalid by the rules of private international law if the formalities do not comply with the law of the place of celebration even if it conforms to the law of the domicile: *Berthiaume v. Dastous*.²⁶ (2) If one refers formalities to the law of the place of celebration it would seem reasonable to refer any question of rectification of informality to the same law. (3) The legislature of that place is more likely than any other to be cognizant of the informality: see the Marriages at St. James's Chapel, Eastbury, Act, 1865 (28 & 29 Vict. c. 81). (4) The legislature of that place is also more likely to give the necessary statutory relief. It is, for example, inconceivable that the Polish Government would have taken steps to validate this marriage. (5) It would produce injustice if the validation of a group of invalid marriages by the legislature of the place of celebration did not cover the case of persons not domiciled there, who might well remain unaware of the invalidity: see *per Somervell L.J.*²⁷ in the present case.

If it be said that a validating Act by the legislature of the place of domicile will be given international recognition but an Act by the legislature of the place of celebration will not, the question arises: what if the parties have different domiciles? When the validation relates to capacity and not to formalities the law of the domicile is preferred, while in the case of formalities it is the law of the place of celebration. The latter covers the validation of an informality.

Three authorities directly on the points submitted support this respondent's general principles: *Salvesen (or Von Lorange) v. Administrator of Austrian Property*,²⁸ *per* Viscount Haldane and Lord Dunedin; *Doe dem. Breakey v. Breakey*²⁹ (in which the court looked at the law at the time when the question was raised and not at the time of the first marriage), and *Luna c. Godin*,³⁰ which, though only of persuasive authority, is on all fours with this case. See also Story on Conflict of Laws, 8th ed., p. 187, para. 113; Cheshire on Private International Law, 4th ed., p. 311; *Scrimshire v. Scrimshire*³¹; *Steele v. Braddell*³²; *Simonin v. Mallac*³³; *Rex v. Lolley*³⁴; *Male v. Roberts*³⁵; *Middleton v. Janverin*³⁶; *Warrender v. Warrender*³⁷; *Swifte v. Attorney-*

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²⁶ [1930] A.C. 79, 83.²⁷ [1952] P. 302, 305; [1952] 2 T.L.R. 606; [1952] 2 All E.R. 616.²⁸ [1927] A.C. 641, 651, 663.²⁹ 2 U.C.R. 349, 357, 361.³⁰ 10 Clunet 621, 624.³¹ 2 Hag.Con. 395, 398, 405.³² (1838) Milw. 1, 20.³³ (1860) 2 Sw. & Tr. 67, 75, 76, 79-80, 83.³⁴ (1812) Russ. & Ry. 237.³⁵ (1800) 3 Esp. 163.³⁶ 2 Hag.Con. 437.³⁷ 2 Cl. & F. 488, 529-30, 532, 535.

H. L. (E.) *General for Ireland*³⁸; *Brook v. Brook*³⁹; *de Massa v. de Massa*⁴⁰; *Galene v. Galene*⁴¹; *Sottomayor v. De Barros*⁴²; *Sottomayor v. De Barros (No. 2)*⁴³; *Norton v. Seton*⁴⁴; *Chetti v. Chetti*⁴⁵; *De Reneville v. De Reneville*⁴⁶; *Pugh v. Pugh*⁴⁷; *Herbert v. Herbert*⁴⁸; *Duchess of Kingston's Case*⁴⁹; Dicey's *Conflict of Laws*, 6th ed., pp. 779, 784.

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The English statutes validating marriages show that all the disadvantages indicated on behalf of the appellant as objections to accepting a foreign validating law are also inherent in those Acts, but the English legislature evidently thought that the advantages outweighed the anomalies, so it cannot be said that retrospective validation is contrary to the policy of our law. The following are statutes of this nature: *Marriages Confirmation Act, 1781* (21 Geo. 3, c. 53); *Marriages Confirmation Act, 1804* (44 Geo. 3, c. 77); *Marriages Confirmation Act, 1808* (48 Geo. 3, c. 127); *Indian Marriages Confirmation Act, 1818* (58 Geo. 3, c. 84); *Clandestine Marriages Act, 1822* (3 Geo. 4, c. 75); *Confirmation of Marriages Act, 1823* (4 Geo. 4, c. 5); *St. Petersburg Marriages Confirmation Act, 1823* (4 Geo. 4, c. 67); *Marriages Confirmation Act, 1823* (4 Geo. 4, c. 91); *Marriages Confirmation (Newfoundland) Act, 1824* (5 Geo. 4, c. 68); *Marriages Confirmation Act, 1825* (6 Geo. 4, c. 92); *Marriages Confirmation Act, 1830* (11 Geo. 4 & 1 Will. 4, c. 18); *Marriages at Hamburgh Act, 1834* (3 & 4 Will. 4, c. 45); *Marriage Act, 1835* (5 & 6 Will. 4, c. 54); *Marriages in St. Anne's Chapel, Wandsworth, Act, 1836* (6 & 7 Will. 4, c. 24); *Marriages in St. Clement's, Oxford, Act, 1836* (6 & 7 Will. 4, c. 92); *Marriages Confirmation (Ireland) Act, 1842* (5 & 6 Vict. c. 113)—see *Reg. v. Millis*⁵⁰; *Marriages Confirmation (Ireland) Act, 1843* (6 & 7 Vict. c. 39); *Church Building (Banns and Marriages) Act, 1844* (7 & 8 Vict. c. 56), s. 3; *Marriages (Ireland) Act, 1844* (7 & 8 Vict. c. 81); *Marriages of Quakers and Jews Act, 1847* (10 & 11 Vict. c. 58); *Consular Marriages Act, 1849* (12 & 13 Vict. c. 68); *Marriages Confirmation Act, 1850* (13 & 14 Vict. c. 38); *Church Building Act, 1851* (14 & 15 Vict. c. 97),

³⁸ [1912] A.C. 276.

³⁹ (1858) 3 Sm. & Giff. 481; (H.L.) (1861) 9 H.L.C. 193, 205, 207, 217-8, 223-4, 235, 241.

⁴⁰ [1939] 2 All E.R. 150n.

⁴¹ [1939] P. 237; 55 T.L.R. 505; [1939] 2 All E.R. 148.

⁴² (1877) 2 P.D. 81; (C.A.) (1877) 3 P.D. 1, 5.

⁴³ (1879) 5 P.D. 94.

⁴⁴ (1819) 3 Phillim. 147.

⁴⁵ [1909] P. 67.

⁴⁶ [1948] P. 100; 63 T.L.R. 82; [1948] 2 All E.R. 86.

⁴⁷ [1951] P. 482; [1951] 2 T.L.R. 806; [1951] 2 All E.R. 680.

⁴⁸ (1819) 3 Phillim. 58.

⁴⁹ (1776) 1 Leach C.C. 146.

⁵⁰ (1844) 10 Cl. & F. 534.

s. 25; Confirmation of Marriages Act, 1854 (17 & 18 Vict. c. 88); Confirmation of Marriages Act, 1855 (18 & 19 Vict. c. 66); Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81), s. 13; Confirmation of Marriages Act, 1856 (19 & 20 Vict. c. 70); Confirmation of Marriages Act, 1857 (20 & 21 Vict. c. 29); Confirmation of Marriages Act, 1858 (21 & 22 Vict. c. 46); Confirmation of Marriages Act, 1859 (22 Vict. c. 24); Confirmation of Marriages Act, 1859 (22 & 23 Vict. c. 64); Confirmation of Marriages Act, 1860 (23 & 24 Vict. c. 1); Confirmation of Marriages Act, 1861 (24 & 25 Vict. c. 16); Ionian Acts of Parliament Act, 1864 (27 & 28 Vict. c. 77); Colonial Marriages Act, 1865 (28 & 29 Vict. c. 64); Marriages at St. James's Chapel, Eastbury, Act, 1865 (28 & 29 Vict. c. 64); Odessa Marriages Act, 1867 (30 & 31 Vict. c. 2); Morro Velho Marriage Act, 1867 (30 & 31 Vict. c. 93); Confirmation of Marriages Act, 1868 (31 & 32 Vict. c. 113); Marriages Confirmation Act, 1869 (32 & 33 Vict. c. 30); Marriages Confirmation Act, 1873 (36 & 37 Vict. c. 1); Marriages Confirmation Act, 1873 (36 & 37 Vict. c. 25); Marriages Confirmation Act, 1873 (36 & 37 Vict. c. 28); Fiji Marriage Act, 1878 (41 & 42 Vict. c. 61); Greek Marriages Act, 1884 (47 & 48 Vict. c. 29); Marriages Validation Act, 1888 (51 & 52 Vict. c. 28); Basutoland and British Bechuanaland Marriage Act, 1889 (52 & 53 Vict. c. 38); Marriages Validity Act, 1899 (62 & 63 Vict. c. 27); Marriages Legalisation Act, 1901 (1 Edw. 7, c. 23); Marriages Legalisation Act, 1903 (3 Edw. 7, c. 26); Provisional Order (Marriages) Act, 1905 (5 Edw. 7, c. 23); Marriages in Japan (Validity) Act, 1912 (2 & 3 Geo. 5, c. 15); Marriages (Validity) Act, 1939 (2 & 3 Geo. 6, c. 35).

If these English Acts have extraterritorial effect it would be unreasonable to deny a similar effect to Acts passed by a foreign legislature: *Phillips v. Eyre*.⁵¹ The Indian Divorces (Validity) Act, 1921 (11 & 12 Geo. 5, c. 18), and the Kenya Divorces (Validity) Act, 1922 (12 & 13 Geo. 5, c. 10), passed to remedy the evil disclosed by *Keyes v. Keyes*,⁵² fit into the picture because divorce is an incident flowing from status and is referred to the law of the domicile. But the jurisdiction is conceded to foreign courts of the place of celebration of a marriage to make internationally recognized decrees so far as formalities are concerned. It would be illogical to recognize a decree of a court of the place of celebration and yet ignore a law passed by the legislature of that place.

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⁵¹ (1870) L.R. 6 Q.B. 1, 23, 30.⁵² [1921] P. 204; 37 T.L.R. 499.

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As to the jurisdiction of foreign courts see *Roach v. Garvan* ⁵³; *Scrimshire v. Scrimshire* ⁵⁴; *Simonin v. Mallac* ⁵⁵; *Sottomayor v. De Barros* ⁵⁶; *Chetti v. Chetti* ⁵⁷; *Administrator of Austrian Property v. Salvesen (or Von Lorang)* ⁵⁸; *Salvesen (or Von Lorang) v. Administrator of Austrian Property* ⁵⁹; *de Massa v. de Massa* ⁶⁰; *Galene v. Galene* ⁶¹; *Castrique v. Imrie* ⁶²; *MacDougall v. Chitnavis* ⁶³; *Casey v. Casey* ⁶⁴; *De Reneville v. De Reneville*. ⁶⁵

If only the law of the domicile of the parties had the power to alter status one would expect that once that law had held a person to be married it would be universally accepted. But that is not so, so far as the constitution of the marriage is concerned; for that one looks to the law of the place of celebration. It is not true that only the law of the place of domicile is effective to alter status. It is only when the law of the place of celebration has determined status that the law of the place of domicile steps in to determine what incidents flow therefrom, what capacities and incapacities.

[Reference was also made to *Dalrymple v. Dalrymple* ⁶⁶; *Salvesen (or Von Lorang) v. Administrator of Austrian Property* ⁶⁷; *Apt. v. Apt* ⁶⁸; *Udny v. Udny* ⁶⁹; *In re Luck's Settlement Trusts* ⁷⁰; *Keyes v. Keyes* ⁷¹; *Swifte v. Attorney-General for Ireland* ⁷²; *Bank voor Handel en Scheepvaart N.V. v. Slatford* ⁷³; *Scott v. Attorney-General* ⁷⁴; *Warter v. Warter* ⁷⁵; *Chetti v. Chetti* ⁷⁶; *MacDougall v. Chitnavis* ⁷⁷; *Lynch v. Provisional Government of Paraguay* ⁷⁸; *Nachimson v. Nachimson* ⁷⁹; Dicey's *Conflict of Laws*, 6th ed., p. 35.]

At the time of the first marriage ceremony the parties consented to marry; the evidence shows that that was their intention and that they believed that the ceremony was effective to marry them. In law when the parties express their consent to marry

⁵³ (1748) 1 Ves.Sen. 157, 158.

⁵⁴ 2 Hag.Con. 395, 408.

⁵⁵ 2 Sw. & Tr. 67.

⁵⁶ 3 P.D. 1.

⁵⁷ [1909] P. 67.

⁵⁸ 1926 S.C. 598.

⁵⁹ [1927] A.C. 641, 652, 656, 660, 670.

⁶⁰ [1939] 2 All E.R. 150n.

⁶¹ [1939] P. 287.

⁶² (1870) L.R. 4 H.L. 414.

⁶³ 1939 S.C. 390.

⁶⁴ [1949] P. 420; 65 T.L.R. 528; [1949] 2 All E.R. 110.

⁶⁵ [1948] P. 100.

⁶⁶ (1811) 2 Hag.Con. 54.

⁶⁷ [1927] A.C. 641, 653.

⁶⁸ [1948] P. 83, 88.

⁶⁹ L.R. 1 Sc. & D. 441, 457.

⁷⁰ [1910] Ch. 864, 873.

⁷¹ [1921] P. 204.

⁷² [1912] A.C. 276.

⁷³ [1951] 2 T.L.R. 755.

⁷⁴ 11 P.D. 128.

⁷⁵ (1890) 15 P.D. 152, 155; 6 T.L.R. 391.

⁷⁶ [1909] P. 67.

⁷⁷ 1937 S.C. 390.

⁷⁸ L.R. 2 P. & M. 268.

⁷⁹ [1930] P. 217.

their words should be taken as expressing their intention, and they should not be allowed to derogate from that expression. The publicly evinced intention of the parties to take each other as husband and wife is conclusive evidence of consent unless there is present some such factor as mistake.

The question of any limitation on the general applicability of a foreign validating Act does not arise in this case: see Dicey's *Conflict of Laws*, 6th ed., p. 17, and *In re Luck's Settlement Trusts*.⁸⁰ There is no difference in this respect between an English and a foreign validating Act.

P. Colin Duncan following. The evidence on the question what the parties intended by the first ceremony was that whereas Henryka said that she never thought that she was contracting a valid marriage, other passages are not on all fours with this, while Richard said that he always thought that he was contracting a valid marriage. There is no express finding by the judge as to which he preferred. So far as Richard was concerned, the evidence was unambiguous that he believed that he was validly married. The priest said that he could not marry the parties before the Americans came, and he performed the ceremony after they came: see *Dalrymple v. Dalrymple*.⁸¹

There are two United States cases on retroactive legislation: *Inhabitants of Goshen v. Inhabitants of Stonnington*⁸² and *Calder v. Bull*.⁸³ The only cases directly in point are *Luna c. Godin*⁸⁴ and *Doe dem. Breakey v. Breakey*.⁸⁵

Heathcote-Williams Q.C. in reply. By giving this foreign validating Act extraterritorial validity one would be substituting uncertainty for certainty. The danger of doing so is that a situation is created in which one starts with a ceremony which is void but which has the potentiality of being validated, and thenceforth there is uncertainty whether or not it will ever be validated. For a validating law to be given universal acceptance beyond the territory of the enacting country it must affect persons domiciled in that country both at the date of the marriage ceremony validated and also at the date of the validating law. There is a vital distinction between the law of the place of the ceremony, which is concerned with the particular ceremony, and the law of the domicile, which is concerned with the continuing state of marriage. Because the courts of the place of celebration can pronounce on the validity of a marriage it does not follow that legislation of

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the same place can pass a validating law. Moreover, there is a distinction between validating marriages where there is a doubt as to their validity and marriages where there is no doubt as to their invalidity. The Austrian validating law here in question would have the effect of making the parties married persons irrespective of their consent, and that is repugnant to English law. Further, it would affect the status of the petitioner who is a British subject, domiciled in England, and who was never domiciled in Austria. On this point *In re Luck's Settlement Trusts*⁸⁶ is relevant. Even if this Austrian law had been passed while the parties were still in Austria, or before they came to England, the date to be looked at would still be the date of the ceremony, the relevant law being the law of the place of celebration.

[He referred to *Brook v. Brook*⁸⁷; *Warter v. Warter*⁸⁸; Story on Conflict of Laws, 8th ed., pp. 187-8, and Savigny on Conflict of Laws, p. 241, para. 2.]

Their Lordships took time for consideration.

November 12. LORD MORTON OF HENRYTON. My Lords, I have had the advantage of reading in print the opinions which will be delivered by my noble and learned friends, Lords Tucker and Cohen, and I agree with them.

The marriage ceremony which took place in Austria on May 19, 1945, was clearly validated, by the laws of that country, before February 11, 1950, when the appellant's mother went through a form of marriage with his father in Croydon. For the reasons given by my noble and learned friends, the appellant's mother must be regarded as having been already a married woman when the latter event took place, and this appeal must be dismissed.

I express no opinion as to the results which might have followed if the ceremony at Croydon had taken place before the Order of the Austrian Provisional Government had come into force, or before the ceremony in Austria had been registered in accordance with that Order.

LORD REID. My Lords, the appellant was born in London in 1949. His parents went through a ceremony of marriage at Croydon in 1950, and the appellant, by his next friend, now seeks

⁸⁶ [1940] Ch. 864, 874.

⁸⁸ 15 P.D. 152, 155.

⁸⁷ 9 H.L.C. 193, 222.

a declaration that that marriage was valid and that he was legitimated by it. The question is whether that marriage was valid, and that depends on whether a previous marriage of the appellant's mother, Henryka, to the respondent Urbanski is to be regarded by the law of England as valid.

In 1945 Henryka and Urbanski were domiciled in Poland and resident in Austria. Henryka was pregnant by Urbanski and they wished to marry. During the German occupation the law of Austria had been changed so as to require a civil marriage. There was some difficulty about arranging a civil marriage, and the priest at Kitzbühel, where they then were, refused to marry them. But when the Germans were driven out there was much confusion and the priest agreed to marry them. They were married in a Roman Catholic church on May 19, 1945. It is admitted that that was not then a legally valid marriage.

On June 30, 1945, a new law came into force in Austria making civil marriage unnecessary: with regard to a religious marriage which had already been solemnized without a civil marriage it provided for the priest sending particulars to the civil registry and enacted that such a marriage should be valid as from the day of solemnization as soon as it had been registered in the civil registry. Owing to some oversight the priest at Kitzbühel failed to forward particulars until 1949, but on July 18, 1949, the marriage was duly registered. It is admitted that before this date the law of Austria would not have regarded the parties as married but that after this date the law of Austria would have regarded them as married and as having been validly married on May 19, 1945.

Before 1949 the parties had become domiciled in England. It was really not disputed that if the question of their status had arisen when they first became domiciled here neither the law of Austria nor the law of England could have regarded them as legally married, and it was not maintained that the law of Poland is relevant in this case. The question to be determined is whether the law of England can give effect to the retrospective Austrian legislation, and the present case appears to me to be indistinguishable from a simple case where two English people domiciled here go through a ceremony of marriage in another country which is invalid in form and return to this country, and then retrospective legislation is enacted in that country which validates the marriage in that country as from the date of its celebration.

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If the respondent is right, then it is possible for foreign legislation to alter the status of English people who were neither domiciled, resident nor present in the foreign country when the legislation was passed nor at any time thereafter. It is certainly unusual that foreign legislation should have that effect whether it purports to be retrospective or not, but I do not think that it can be laid down as a universal rule that it can never have that effect and therefore it is necessary to consider more closely the circumstances of cases like the present case.

It has long been settled that the formal validity of a marriage must be determined by the law of the place where the marriage was celebrated. But if there has been retrospective legislation there, then a further question arises: are we to take the law of that place as it was when the marriage was celebrated, or are we to inquire what the law of that place now is with regard to the formal validity of that marriage? This question does not appear to have arisen for decision in England. There are many cases in which there have been statements of high authority of the general principle and of its application in various circumstances, but I do not think it helpful to analyse these statements of the law. I can find nothing to indicate that the present question was even in contemplation in any of these cases, and at best one could only make a speculative inference from words used as to what their author might have thought if he had had to consider the present question. Some other authorities were cited, but they do not appear to me to carry one very far. To my mind the best way of approaching this question is to consider the consequences of a decision in either sense. The circumstances are such that no decision can avoid creating some possible hard cases, but if a decision in one sense will on the whole lead to much more just and reasonable results, that appears to me to be a strong argument in its favour.

Cases calling for retrospective legislation have frequently occurred in England. The common case is that some fact has been discovered which shows that marriages celebrated in particular circumstances were invalid: sometimes many marriages extending over a long period were involved, but no one had suspected that these marriages were other than valid. It was then thought proper to pass legislation which had the effect of validating these marriages *ab initio*. If that had not been done there would have been great confusion and in many cases great injustice. It can be assumed that some of the marriages

involved were between persons domiciled in other countries, and similar cases may well have occurred abroad. H. L. (E.)

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Persons domiciled in England may have been married in another country by ceremonies apparently valid but later discovered to be invalid, and retrospective legislation may then have been passed in that country. If people have lived and acted and brought up families in the reasonable belief that they were married, it is highly desirable that the law should recognize some practical way of neutralizing a belated and fortuitous discovery that their marriage was formally invalid. But if retrospective legislation in the country where the marriage was celebrated is to be of no avail to persons domiciled outside that country, it will seldom be possible for the country of their domicile to afford any remedy. If validating legislation is passed soon after the cause of the invalidity has been discovered, it is not easy to see how any practical difficulties or hardships can result from it.

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But serious difficulties could arise if there were a long interval between the discovery of the invalidity and the remedial legislation. If the spouses are still living together when the invalidity is discovered, they can avoid most of the difficulties by remarrying. But if they have separated they would be in the position of knowing that they are for the moment unmarried but are liable at any time to become married against their wishes by retrospective legislation. It was argued that we should only recognize foreign retrospective legislation if the spouses in some way consented to its operation, but that argument is based on a misapprehension of what such retrospective legislation sets out to do. It has no concern with the state of affairs at the time when it is enacted: its purpose is to validate the original ceremony, and if there was then the necessary consent to marry, that is all that matters. Then it was argued that no valid consent was given in this case at the ceremony in 1945 because the wife Henryka knew that the ceremony was insufficient to constitute a legal marriage; but it is not proved that the husband Urbanski also knew that, and the wife cannot be heard to say that her consent freely given in church was not a consent to marry. I need not consider what the position would be if both parties knew at the time that the ceremony was insufficient in law.

It was suggested in argument that the law of England might recognize foreign retrospective legislation subject to certain qualifications or exceptions. For example, it was said that if

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one of the parties had entered into another marriage before the retrospective legislation took effect, then a different rule should apply; and it was suggested that if an English court of competent jurisdiction had decided that either party was unmarried, then subsequent retrospective foreign legislation should not affect that decision. It would not be proper to attempt to decide such questions in advance, but I shall assume for the purpose of the present argument that such exceptions would not be made and that a person who knew that his marriage abroad was invalid for want of form might be left in complete uncertainty if the circumstances were such as to make it at all reasonable to suppose that validating legislation might be passed. If that is so, there is at first sight compelling force in the appellant's argument that a person ought at any time to be able to find out with certainty whether he or she is married or not, and that the law of England ought not to recognize a principle which may result in a person being for the moment unmarried in law but knowing that he is liable to become married retrospectively. If there were any substantial likelihood of this happening I would be inclined to agree, but one must look at realities. I find it difficult to suppose that in any country there would be substantial delay in deciding whether to legislate retrospectively once the reason for the invalidity had come to light, and I cannot think that anyone who had discovered that his marriage was formally invalid would for long be in any real doubt whether there was to be remedial legislation. In the present case remedial legislation was promptly enacted, and this could have been discovered and, indeed, may have been known to the parties: it was only by a mischance that the necessary executive action in Austria was delayed for four years.

Accordingly, in my opinion the balance of justice and convenience is clearly in favour of recognizing the validity of such retrospective legislation (subject, it may be, to some exceptions), and the objections to doing so are not substantial and are not founded on any compelling principle. Once it is settled that the formal validity of a marriage is to be determined by reference to the law of the place of celebration, there is no compelling reason why the reference should not be to that law as it is when the question arises for decision. I therefore agree that this appeal should be dismissed.

LORD TUCKER [having stated the facts]. My Lords, counsel for the Attorney-General, in supporting the judgments of the

courts below, submitted that the case was governed by the well-established rule of private international law that, so far as formalities are concerned, the validity of marriage is governed by the *lex loci celebrationis*, and he cited the well-known passage by this effect in the speech of Lord Dunedin in *Berthiaume v. Dastous*¹ and other authorities to the like effect.

Counsel for the appellant did not dispute this principle, but contended that an equally well-established rule of private international law was applicable to the facts in this case, viz., that the courts of one country will not recognize the extraterritorial effect of a foreign statute on the status of a person not domiciled in or the subject of the legislating State.

The problem is whether a foreign validating Act with retroactive effect dealing with the form of marriage but with consequential effect on the status of persons domiciled outside the legislating country should be treated as a law concerning the formality of marriage or as a law affecting status.

My Lords, at one time I felt some doubts whether on its special facts this case did in truth involve a conflict between these two principles having regard to the fact that at the date of the coming into force of the validating Order of June 26, 1945, Henryka and Richard were still resident within the jurisdiction of the country where they had gone through the marriage ceremony, and the registration of the marriage was merely an administrative act which should have been carried out immediately after the ceremony but which happened to have been delayed until the parties had left and acquired a fresh domicile elsewhere. On consideration, however, I have reached the conclusion that the date of registration is the material date in this connexion, and that the position is the same as if Order No. 31, having immediate retroactive effect without the necessity for registration, had been enacted on July 18, 1949.

Which, then, of these two conflicting principles should your Lordships—in the absence of authority—apply to this case? Whichever is chosen must inevitably result in hardship to one or other of the children whose legitimacy is in question.

My Lords, I feel little doubt that it is the former that should prevail and be regarded as an exception to the latter, or rather, perhaps, that the latter should be interpreted as referring to laws directly affecting status as distinct from those which deal with form and only have indirect or consequential effect on status.

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¹ [1930] A.C. 79, 83; 45 T.L.R. 607.

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What influences me most in reaching this conclusion is that there is no field of legislation which has been so fruitful of retrospective validating legislation in this country as that of marriages invalid for lack of some requisite formality. Your Lordships were referred to more than fifty of such statutes between 1780 and 1939. Seventeen of these Acts deal exclusively with marriages outside the United Kingdom in territories or portions of territory regarded for certain purposes as notionally British soil and generally apply only where one or both of the parties is a British subject, but the remainder deal with marriages in the United Kingdom and in no single instance is the validity made to depend upon the domicile of the parties at the date of marriage or at the date of the Act. The legislature of this country has clearly assumed competence to pass legislation validating informal marriages contracted here irrespective of domicile or nationality. It would seem to be in accord with comity and with principle that our courts should recognize the validity of similar foreign laws dealing with an aspect of marriage, viz., formality, which has always been recognized as governed by the *lex loci celebrationis*.

There are other reasons for accepting this view, the most cogent of which are, I think, as follows: (1) Since a marriage, even if valid by the law of domicile, is regarded as invalid if not in conformity with the law of the place of celebration, it would seem illogical if this same law cannot retrospectively cure the invalidity. (2) The legislature of the place of celebration is more likely to be cognizant of the informality and accordingly more likely to afford the necessary statutory relief.

A number of authorities were cited in argument and several of them are referred to in the judgments of the courts below. None really deal with the problem which now arises for decision for the first time.

It is, however, satisfactory to find that in the case of *Luna c. Godin*² the French courts accepted the principle of private international law which Barnard J. and the Court of Appeal considered applicable.

It would not, I think, be right to found too much on the language of Robinson C.J. in the Canadian case of *Doe dem. Breakey v. Breakey*³ because he was in fact dealing with an Imperial statute which was binding on him, but he did say⁴: "Now, if none of the exceptions in the statute prevent its applying for the purposes of this action, and if the marriage

² (1881) 10 Clunet 621.⁴ Ibid. 357.³ (1846) 2 U.C.R. 349.

“ were by that Act made valid in Ireland merely, it follows that
 “ we must treat it here as having been a valid marriage at the
 “ time it was solemnized; for it is the *lex loci* that must govern.”

There is also a sentence in the speech of Lord Haldane in *Salvesen (or Von Lorang) v. Administrator of Austrian Property*⁵ which seems to be in accord with the view I have endeavoured to express. That case decided that when the parties to a marriage are domiciled in a foreign country a decree of nullity of marriage pronounced by a competent court of that country will, in the absence of fraud or collusion, be recognized as binding and conclusive by the courts of England and Scotland unless it offends against British notions of substantial justice. In the course of his speech to this effect Lord Haldane said⁶: “ No later French law which would apply nor any circumstances had cured the invalidity thus brought about.”

With regard to the case of *Lynch v. Provisional Government of Paraguay*,⁷ where it was held that succession to property in England of a deceased foreigner is governed by the law of the place of his domicile at the time of his death and that no subsequent retrospective legislation would be recognized as affecting the distribution of his personal property in England, I agree with the observation of Barnard J. that that case decided that the relevant date was the time of death, whereas in the present case the relevant date is that of the second ceremony and that consequently the decision is one which would have been of more assistance to the petitioner if the second ceremony had preceded the registration of the first marriage.

*In re Luck's Settlement Trusts*⁸ was a case where the Court of Appeal, by a majority, held that, as the father of an illegitimate child, born in California, had not acquired a domicile of choice in California at the date of the child's birth, a declaration of adoption, after he acquired domicile and which by Californian law was effective to legitimate the child as from birth, could not be recognized by the courts in this country. In that case it was not disputed that the law of domicile had to be applied, but the question was whether domicile at the date of the child's birth or domicile at the date of the declaration of adoption was to be looked at. In the course of the majority judgment, however, there are passages in which Greene M.R. and Luxmoore L.J. assume that no provision of foreign law will be recognized

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⁵ [1927] A.C. 641; 43 T.L.R. 609.⁶ [1927] A.C. 641, 651.⁷ (1871) L.R. 2 P. & M. 268.⁸ [1940] Ch. 864; sub nom. *In re Luck, Walker v. Luck*, 56 T.L.R. 915; [1940] 3 All E.R. 307.

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here as effective to change the status of a person not domiciled in the foreign country at the time, except perhaps where the law of the country in which such person is domiciled would itself recognize such foreign law. This language was used with reference to laws expressly directed to the alteration of status, and the court was not concerned to express any view as to the indirect effect on status of foreign law dealing with the formalities of marriage which have always been recognized as being within the province of foreign law. I do not, therefore, consider that any real assistance is to be derived from that case.

It was further contended by the appellant that in any event there was no evidence that Henryka had consented to the registration of the marriage and insufficient evidence that she had consented to marry in that she knew that the ceremony was invalid by Austrian law.

So far as registration is concerned, this being a mere administrative requirement in no way dependent upon the will of the parties, it is clear that want of consent on her part is immaterial. As to consent to the marriage, the trial judge has made no finding, but it is to be observed that although there was evidence that the parties knew that such a ceremony was invalid prior to the liberation of Austria, it is by no means clear that they were aware that after the liberation, which had taken place before the marriage, such a ceremony was still invalid. But in any event, in my opinion, it would be impossible to hold that there is such an absence of consent as to vitiate the marriage where the parties have gone through a form of marriage in accordance with the rites of the Roman Catholic Church with the intention of creating a union binding on them in the eyes of the Church to which they belong.

I do not consider it necessary or desirable to express any opinion as to whether it follows from this decision that the result would necessarily be the same if the parties had acquired a domicile here and contracted a marriage valid by the law of this country before the passing of the foreign validating statute.

For the reasons stated above and those contained in the judgment of Barnard J. and the Court of Appeal, I would dismiss this appeal.

LORD ASQUITH OF BISHOPSTONE. My Lords, I have had the advantage of reading, in print, the opinion of my noble friend, Lord Tucker. I agree in general with his reasoning, and in particular with his analysis of the authorities, none of which seem

to me to be helpful in relation to the facts of this case. I desire to add nothing under the last head, and only a few sentences on the more general issue.

This House has strongly affirmed the principle “locus regit actum”: *Berthiaume v. Dastous*.⁹ Where two persons, neither of them domiciled in country A, enter into a ceremony or formalities which according to the laws of that country constitute a valid marriage, the law of England will recognize that marriage as valid. I can see no material distinction in this regard between the observance, as between the parties, of formalities which suffice to make a marriage valid ab initio according to the local law, and of formalities which are not so sufficient but the insufficiency of which is (almost immediately in this case) repaired by a validating Act of country A's legislature. Here, the marriage ceremony took place in Austria in May, 1945, and the validating Act was passed in June, taking effect from June 30. True, it contained a provision that the validation should not be complete until the irregular marriage was entered in a certain register: and that there was a delay of four years in so entering it. But before the second ceremony of marriage was performed, the triple complex (ceremony, validation, and registration) was complete in relation to the first marriage, and the parties validly married. The registration was, in my view, a mere ministerial act, not necessarily dependent on the will of the parties—a mere by-product or corollary of what happened in 1945, to which year it may not unreasonably be related back. But whether its actual date is taken as decisive, or whether it can be antedated notionally by four years, the fact remains that all three of the requirements necessary to validate the first marriage had been fulfilled before the marriage ceremony of 1950 was solemnized. The question what was the precise matrimonial status of the parties between 1945 and the date of registration (1949) is by no means easy, but does not arise on the facts of the present case.

There is no rule of English private international law which precisely covers the facts of this case. The appellant suggested that retrospective validating Acts were repugnant to English public policy, and that English public policy was a factor to which weight should be attributed in moulding the rules of English private international law or in adapting them to new combinations of fact. I would not demur to the second of these propositions, but the history of our domestic legislation seems

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⁹ [1930] A.C. 79, 83.

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to me destructive of the first. The table of validating English statutes produced by the respondents seemed to me decisive on this point. Validating Acts may, of course, result in some hard cases: often with the object of obviating a larger body of hard cases. Nevertheless, our legislature has endured and indulged them on a very large scale, and the argument so far as based on public policy would seem to be ill-founded.

I agree that the appeal should be dismissed.

LORD COHEN. My Lords, the question for your decision was correctly and succinctly stated by Barnard J. as follows¹⁰: "Were both parties" (to the marriage which was celebrated at Croydon) "free to marry on February 11, 1950?" It was common ground between the parties before your Lordships that the correct answer to this question depends on the further question whether the ceremony of marriage celebrated in the parish church at Kitzbühel on May 19, 1945, was a valid form of marriage, and that this further question must be determined by the law of Austria. The appellant contended that the law of Austria to be applied is the law as it stood on May 19, 1945, whereas Mr. Simon, for the Attorney-General, argued that the law applicable was that law as amended down to February 11, 1950.

The general principle that the validity of a marriage as regards form is governed by the *lex loci celebrationis* is not in dispute, and Mr. Simon took us through a number of cases in England and Scotland in which that principle has been stated in terms wide enough to support his contention that the question must be answered as the courts of the place of celebration would have answered it on the date as at which it became material to determine the question (in this case February 11, 1950), but in none of the cases was the attention of the court or of this House directed to the particular point which your Lordships have to decide. I do not, therefore, find it necessary to trouble your Lordships with any of those authorities except *Salvesen (or Von Lorang) v. Administrator of Austrian Property*.¹¹ In that case it became necessary to determine the validity of a decree of nullity granted in 1924 by a German court in regard to a marriage celebrated in Paris in the year 1897 between an Austrian citizen and a British subject then domiciled in Scotland. At the time of the decree the parties were clearly domiciled at Wiesbaden

¹⁰ [1952] P. 135, 147; [1952] 1 T.L.R. 851; [1952] 1 All E.R. 495.

¹¹ [1927] A.C. 641.

in Germany. The evidence established that the parties had not in 1897 complied with the requirements of French law as to residence and publication, and the German court, acting on the principle *locus regit actum*, declared the marriage null and void. Viscount Haldane, in setting out the facts, said ¹²: "The" (German) "court satisfied itself that the marriage had been" constituted neither in accordance with the conditions required "by French law nor in accordance with those required by the" "law of the domicil. *No later French law which would apply*" (the italics are mine) "nor any circumstances had cured the" "invalidity thus brought about." Mr. Simon submitted, I think correctly, that the reference to "later French law" would have been irrelevant had Viscount Haldane not thought that a later French law retrospectively validating the defective ceremony would have altered the position.

Mr. Heathcote-Williams and Mr. Dobry, for the appellant, pointed out that even if this is the correct inference to be drawn from Viscount Haldane's speech, it is in the nature of dictum, and they emphasized the inconveniences which would arise from the acceptance of Mr. Simon's argument. Thus, an Englishman who had been through a defective ceremony abroad would never know whether he was married or single. If, relying on the ceremony being invalid, he entered in England into a marriage undoubtedly valid at the time it was celebrated, he might find doubts cast on this marriage if subsequent to the date thereof a decree similar to Order No. 31 in the present case were passed in the country where the original ceremony took place declaring it to be a valid form of marriage as from the date of solemnization. That difficulty does not arise in the present case, and I do not propose to express an opinion as to how the doubts ought in such a case to be resolved. I would observe, however, that other difficulties would arise from the acceptance of the arguments for the appellant. The parties to the marriage abroad might live and die in ignorance that there was any doubt as to the validity of the marriage ceremony. Yet, unless those doubts could be removed by a validating law passed in the country where the ceremony took place, the courts of this country might be bound to hold that the children of the marriage were illegitimate.

Mr. Dobry argued that recognition in the courts of this country of the validity of an Act passed by the Parliament of the place of celebration retrospectively validating a defective ceremony

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¹² [1927] A.C. 651.

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would infringe the principle that the law of the domicile regulates essentials as distinct from forms since such retroactive legislation might have the effect of altering the status of a person from single to married. This argument at first attracted me, but on consideration I do not see that it gives any greater power to the foreign law to affect status than is necessarily involved in the principle *locus regit actum*. Moreover, the law favours the validity of marriage, and Parliament in this country has never hesitated to pass retroactive legislation to cure defects in form. Your Lordships' attention was called to a large number of such statutes, an instance of which was the Greek Marriages Act, 1884 (47 & 48 Vict. c. 20).

As Mr. Simon pointed out, the legislature of the place of celebration is more likely than the legislature of the place of domicile to become cognizant of informality and more likely, therefore, to grant the necessary statutory relief.

I must refer to two cases on which Mr. Heathcote-Williams particularly relied. The first was *Lynch v. Provisional Government of Paraguay*.¹³ In that case a domiciled Paraguayan died in Paraguay leaving personal property in England. After his death, but before a grant was made in England, a decree of the Government of Paraguay purported to confiscate all his property wherever situate. The Government of Paraguay opposed the grant of probate in England to the person who was universal legatee at the date of death, but Lord Penzance, in delivering judgment, pointed out the inconvenience and injustice which might arise from any other conclusion than that which he proceeded to state, and, in the absence of authority to the contrary, held himself bound, in deciding who was entitled to a grant, to have regard only to the law of the place of domicile as that law existed at the time of death. The subject-matter with which Lord Penzance was dealing is, however, so remote from the question before your Lordships that I cannot regard his observations as throwing any light on the present case, especially when I remember that under the law of England probate of a will when granted relates back to the date of death.

In *In re Luck's Settlement Trusts*¹⁴ the question at issue was whether a child, illegitimate by the law of England at the date of its birth, of a person domiciled in England at that date would be recognized, by the law of England, as the legitimate child of that person if he was subsequently legitimated by adoption

¹³ L.R. 2 P. & M. 268.

¹⁴ [1940] Ch. 864.

according to the law of California, in which State the father had by then acquired domicile.' The Court of Appeal, applying the principle adopted by English courts in regard to legitimation by subsequent marriage, held that by the law of the father's domicile at the date of the son's birth the relationship was immutably that of putative father and illegitimate child and nothing thereafter could change it. Luxmoore L.J., delivering the judgment of himself and Greene M.R., posed this question¹⁵: "Will the English courts recognize the power of Californian law retrospectively to affect the status of a person in respect of a period when that status was subject to the law of England and none other?" Luxmoore L.J. went on to say that, having regard to the view which he and Greene M.R. took on the broader issues of the case, it was unnecessary to answer this question. Mr. Heathcote-Williams, however, submitted that it is clear from the judgment that they would have answered it in the negative. I do not find it necessary to consider whether Mr. Heathcote-Williams is right or whether the answer he suggests that the Court of Appeal would have given to the question is correct; for in *In re Luck's Settlement Trusts*¹⁶ their Lordships were dealing with an issue which was admittedly governed by the law of the domicile, whereas your Lordships have to deal with a question which the law of the domicile refers to the law of the place of celebration.

In my opinion, therefore, there is no reported case which supports the arguments advanced on behalf of the appellant. On the other side there is the dictum of Viscount Haldane in *Salvesen (or Von Lorang) v. Administrator of Austrian Property*,¹⁷ to which I have already referred, and of the Chief Justice in *Doe dem. Breakey v. Breakey*,¹⁸ to which both Barnard J. and Somervell L.J. referred. These support the view expressed by Somervell L.J., with which I respectfully agree, that¹⁹ "legislative Acts of the kind in question are passed to remedy what has been done in good faith but turns out not to have achieved the result which the parties intended," and that there is "no reason why those who were at the time, or later became, domiciled elsewhere" (than in the country where the marriage was celebrated) "should be impliedly excepted from its provisions."

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¹⁵ [1940] Ch. 874.¹⁶ Ibid. 864.¹⁷ [1927] A.C. 641.¹⁸ 2 U.C.R. 349, 357.¹⁹ [1952] P. 302, 304-5; [1952] 2 T.L.R. 606; [1952] 2 All E.R. 616.

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For these reasons I would dismiss the appeal and would add that the fact that a similar conclusion was reached by the French courts in *Luna c. Godin*²⁰ suggests that the orders of the courts below are in accordance with a generally accepted principle of private international law.

Like my noble and learned friends, Lords Morton of Henryton and Tucker, I express no opinion as to the consequences which might have ensued if the ceremony at Croydon had taken place before the Order of the Austrian Provisional Government had come into force, or before the ceremony in Austria had been registered pursuant to that Order.

Appeal dismissed.

Solicitors: *George & George; Treasury Solicitor.*

²⁰ 10 Clunet 621.

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COMMISSIONER OF TAXATION OF THE
COMMONWEALTH OF AUSTRALIA

APPELLANT;

AND

SQUATTING INVESTMENT COMPANY LD. RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Revenue—Income tax—Trade profits—Wool realization scheme—Distribution of profits—Voluntary payments by government—Trade receipt of income nature—Liability to tax—National Security (Wool) Regulations, 1939 (S.R. 1939, No. 108)—Wool Realization (Distribution of Profits) Act, No. 87 of 1948, s. 7—Income Tax Assessment Act, 1936–49, s. 25.

Revenue.

The respondents carried on business as growers of wool in Australia during the years 1939 to 1946 inclusive, and the wool grown by them in those years was compulsorily acquired by the Commonwealth pursuant to the National Security (Wool) Regulations, 1939, which were made for the purpose of carrying out an arrangement made between the United Kingdom Government and the Commonwealth Government at the outbreak of the war in 1939, by which the United Kingdom Government purchased all wool produced in Australia, except that required in Australia, for the

* *Present*: LORD PORTER, LORD MORTON OF HENRYTON, LORD REID, LORD ASQUITH OF BISHOPSTONE, and LORD COHEN.

period of the war and one wool year thereafter, one term of the arrangement being that the two governments would divide equally any profit arising from the resale outside the United Kingdom of wool purchased under the arrangement. In pursuance of the regulations the Commonwealth acquired the whole of the Australian wool clip in each year during the war, and the suppliers of wool duly received the whole of the compensation moneys to which they were legally entitled under the regulations.

The resale to other countries of part of the wool purchased by the United Kingdom Government resulted in large profits. To make provision for the disposal of its share of those profits the Commonwealth passed the Wool Realization (Distribution of Profits) Act, 1948, under which, inter alia, those who had supplied participating wool—shorn wool obtained from the shearing of live sheep—were each to receive an amount which bore to the amount to be distributed the same proportion as the appraised value of the wool they had supplied bore to the total of the appraised values of all participating wool. On a claim by the appellant, the Commissioner of Taxation, that the respondents, who had supplied participating wool for appraisal under the regulations and had duly received the appropriate sum on the distribution under the Act of 1948—at which date they were still carrying on business as wool growers—were liable for income tax in respect of that sum:—

Held, that having regard to the whole history of the matter, the sum received by the respondents pursuant to the provisions of the Act of 1948 must be regarded as an additional payment voluntarily made to them for wool supplied for appraisal, or, if the compulsory acquisition could properly be described as a sale, a voluntary addition made by the Commonwealth to the purchase price of the wool. It was in the respondents' hands a trade receipt of an income nature, and formed part of their assessable income under section 25 of the Income Tax Assessment Act, 1936-49, as "gross income" derived directly or indirectly from all sources whether in or out of "Australia . . . which is not exempt income," and was accordingly liable to tax.

Ritchie v. Trustees Executors and Agency Co. Ltd. (1951) 84 C.L.R. 553 approved: there were no circumstances which differentiated the payment made in that case, which was held to be a receipt of an income nature, from the payment made to the respondents in the present case; and there was nothing in *Perpetual Executors Trustees and Agency Co. (W. A.) Ltd. v. Maslen* [1952] A.C. 215, which had no bearing on the problem arising in the present case and was in no way directed to income tax questions, to indicate that the Board disapproved of the reasoning or the decision in *Ritchie's* case (*supra*).

Order of the Full Court of the High Court of Australia (1953) 86 C.L.R. 570 reversed.

APPEAL (No. 34 of 1953), by special leave, from two orders of the High Court of Australia, one by the Full Court (April 13,

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1953) answering certain questions upon a case stated by Dixon C.J., and the other made by Kitto J. (May 15, 1953) allowing, pursuant to such answers, the appeal of the present respondent from its assessment for income tax (under the Income Tax Assessment Act, 1936-49, of the Commonwealth of Australia) in respect of income derived during the year ended December 31, 1949.

The main issue in the appeal was whether the respondent company, a wool grower in Australia, was liable for income tax upon a distribution made to it under the Wool Realization (Distribution of Profits) Act, 1948, an Act which provided for distribution among wool growers of profits accruing to the Commonwealth Government as a result of arrangements regarding wool made between the United Kingdom and Commonwealth Governments from the year 1939 onwards.

While the sum received by the respondents was £22,851, it was stated that in all about £50,000,000 in tax was involved, which had already been taken into account in the current Australian budget, being about 9 per cent. of their total income tax revenue.

The majority in the High Court (McTiernan, Williams and Webb JJ.) held, contrary to the contentions of the present appellant, that the payments in question were not income within the meaning of section 25 of the Income Tax Assessment Act, 1936-49, which provided that “ (1) The assessable income of a taxpayer shall include—(a) where the taxpayer is a resident—“ the gross income derived directly or indirectly from all sources “ whether in or out of Australia . . . which is not exempt “ income.” They also held that the payments did not come within section 26 (g) of that Act, which provided that: “ The “ assessable income of a taxpayer shall include— . . . (g) any “ bounty or subsidy received in or in relation to the carrying on “ of a business, and such bounty or subsidy shall be deemed to be “ part of the proceeds of that business.” The dissenting members of the court (Fullagar and Kitto JJ.) held that the payments were income within section 25 of the Act, and, holding that view, did not discuss whether the payments came within section 26 (g); the minority judges answered the second question in the case stated by holding that the payments were income of the year ending December 31, 1949, in which they were received.

The facts and the relevant statutory provisions appear fully from the judgment of the Judicial Committee.

1953. Nov. 25, 26, 30; Dec. 1, 2, 3. *Sir Hartley Shawcross Q.C., Heyworth Talbot Q.C., A. D. G. Adam Q.C. (Australia), J. W. Brunyate and F. N. Bucher* for the appellant. The payment in question was made to the respondent company pursuant to a statutory direction, but made to it voluntarily in the sense that it had no legal claim to it, and the basic question is whether it constitutes an ingredient in the company's taxable income. This argument will be directed to supporting the general proposition that any sum received by a trader whilst he is carrying on his trade—and in Australia probably whether he still continues to carry on his trade or not, a distinction which does not arise in this case—if paid to him by reference or in relation to something which he has done or is doing in the course of that trade, is *prima facie* a trade receipt to be brought into account in computing the profits or proceeds of the trade, unless, of course, it bears the marks of a capital receipt, which again does not arise here. The real character of the payment here is that of the proceeds of a business. The Australian legislation does not give any exhaustive definition of what is income. It is submitted that the sums received (a) formed part of the "gross income" of the respondents within the meaning of section 25 of the Income Tax Assessment Act, 1936–49, of the Commonwealth; (b) were the ingredients of the "profit arising from the carrying on or carrying out of a "profit-making undertaking or scheme," namely, the business of wool growing, within the meaning of section 26 (a) of that Act; or (c), if not otherwise income, the sums received were a bounty or subsidy received in relation to the carrying on of a business within the meaning of section 26 (g) of the Act, and were taxable accordingly.

Considering first the general question of voluntary payments; the English authorities which deal with the liability of gifts to tax relate to gifts made to people who received them in connexion with a particular employment or office which contributed to inspiring the benevolence of the donor. There is none in which the voluntary gift is related to a trading source as distinct from a personal service of the donee. The position in this respect is broadly that a receipt is taxable if, looking at it from the point of view of the donee, it is received by him in the character of the holder of an office or the conductor of a trade. Sometimes these cases are a matter of degree. One looks in vain in the present case for any considerations which are really personal to the respondent donee as one generally understands them. The principle may perhaps be analysed by saying that if the payment is

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made in recognition or in respect of services rendered or goods supplied it constitutes an ingredient of taxable income whether it is paid voluntarily or as a matter of legal obligation, provided that there is an income-producing source such as an employment or trade. Only those personal gifts which come to the recipient because of considerations wholly unrelated to his employment or trade are outside the scope of emoluments which would be subject to tax. [Reference was made to *Wing v. O'Connell*¹; *Herbert v. McQuade*²; *Cooper v. Blakiston*³; *Martin v. Lowry*,⁴ and *Seymour v. Reed*.⁵] The mere fact that a payment is not a recurrent payment does not prevent it being income. *Seymour v. Reed*,⁵ which is against the appellant here, is the high-water mark of cases in that category, and the principle of it was referred to in *Corbett v. Duff*.⁶ The case on which the present respondents very much relied, *Stedeford v. Beloe*,⁷ was really not in the true sense a gift case at all, and is far removed from the present case; there was no present office; the headmaster had retired, and the office of source had ceased.

There are a number of other cases of gifts which were similar, and the decisions turned on the fact that there was nothing in the nature of a taxable source of income on which, so to speak, to tack the voluntary payment, and those payments not being capable of being assigned to an income tax source were not taxable. What the authorities seem to show—and it is a mixed conclusion of law and fact—is that if a particular payment is received by its recipient in the character of one who holds, or in Australia has held, an office, or applying that principle to this case, if the particular payment is received by one who carries on, or has carried on, a trade, and is related to that office or trade, then it attracts tax. If, on the other hand, it is given to somebody who happens to have been, or even to be, the holder of some particular office or the conductor of some trade, but unconnected with that office or trade, it is a true personal gift and not taxable.

The position in this case was that the recipients of the wool distribution profit were identified as the suppliers of participating wool, but the payment was made to them not simply because they were so identified, but because they had in fact supplied participating wool, and the first payment, the additional adjustment,

¹ [1927] I.R. 84, 103.

² [1902] 2 K.B. 631, 649; 18 T.L.R. 728.

³ [1907] 2 K.B. 688, 694–5, 702; [1909] A.C. 104, 106; 23 T.L.R. 663; 25 T.L.R. 164.

⁴ [1927] A.C. 312; 43 T.L.R. 116.

⁵ [1927] A.C. 554, 557 et seq.; 43 T.L.R. 584.

⁶ [1941] 1 K.B. 730, 739–40; 57 T.L.R. 429; [1941] 1 All E.R. 512.

⁷ [1932] A.C. 388; 48 T.L.R. 291.

and now this final payment all have their source in the business of growing and supplying wool. [Reference was made to the National Security (Wool) Regulations (S.R. 1939, No. 108), made under the National Security Act, 1939, to the Wool Realization Act, 1945, and the Wool Realization Regulations of 1946, and to the Act under which the distribution in question took place, the Wool Realization (Distribution of Profits) Act, 1948.] There are three Australian decisions on the Act of 1948: *Maslen v. Perpetual Executors Trustees & Agency Co. (W.A.) Ltd.*⁸—Fullagar J.'s dissenting judgment in that case was affirmed by the Privy Council on appeal; *Ritchie v. Trustees Executors & Agency Co. Ltd.*⁹—which was decided before the decision of the Privy Council in *Maslen's* case¹⁰; and *Poulton v. The Commonwealth*¹¹—decided after the decision of the Privy Council in *Maslen's* case.¹⁰ What in effect was said in the dissenting judgment of Fullagar J. in *Maslen's* case¹² was not that the payment was never an asset of the business; it was, but that it was not an asset before it was paid because there was never any right to receive it. In *Ritchie's* case¹³ the High Court unanimously held that the trustees of a settled estate receiving a distribution under the Act of 1948 should treat it as income and not capital as between life tenant and remainderman. The result did not turn on the provisions of the particular trust deed, but on the general character of the payment. The court held that the payments constituted receipts resulting from the operation of wool growing; that "as possible or contingent" receipts they were in contemplation when the appraisements "were made"; and that "the title to receive them when in the end it is placed on a legal basis consists in the submission of shorn wool for appraisalment for the purposes of the Wool Purchase Arrangement." *Ritchie's* case¹³ was rightly decided and strongly supports the arguments of the appellant in the present case.

Ritchie's case,¹³ though not referred to in the report of *Maslen's* case¹⁴ when it came on appeal to the Privy Council, was in fact cited to the Board, but it was not fully canvassed. The point in *Maslen's* case¹⁴ was whether a sale or assignment of business assets would carry this payment under the Act of 1948, and the answer was that the payment was not at the time of assignment an asset at all, because it had not been paid and

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⁸ (1950) 82 C.L.R. 101, 117.¹² 82 C.L.R. 101, 117.⁹ (1951) 84 C.L.R. 553.¹³ 84 C.L.R. 553.¹⁰ [1952] A.C. 215.¹⁴ [1952] A.C. 215.¹¹ Unreported.

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there was no chose in action in relation to it and therefore it was not covered by the assignment. It is submitted that that is wholly consistent with the view that when the payment did come in it was a revenue receipt. The majority of the judges of the High Court in the present case have misapprehended the intention of this Board in using the words "a personal gift" in *Maslen's case*.¹⁴ The fact that the payment was, prior to the statutory entitlement, a voluntary one did not prevent its being assessable income when in fact received. The description of it as "a personal gift" in the context in which that expression was used in *Maslen's case*¹⁴ does not in any way conclude the matter. In an income tax context that expression is used as the condensation of an expanded phrase—a personal gift on personal grounds and otherwise than for services rendered. Whereas, in its context in *Maslen's case*¹⁴ it denotes the destination of the payment, that it was a payment for the supplier of wool himself and not for the assignee of his business. It is nowhere said in that case that although a personal gift it is not a proceed of the business of a wool grower. The description of the payment in *Maslen's case*¹⁴ as "extra proceeds," "extra profit," "additional payment" and "extra sum paid" supports the arguments of the appellant here. Further, the actual decision in *Maslen's case*¹⁴ was directed to a point which does not arise in the present case, namely, the identification of the person intended to benefit, and the use of the words "a personal gift" raises no implication contrary to the appellant's contentions here. There is a South African case,¹⁵ decided after the judgment of the High Court of Australia in the present case, in which, rightly, it is submitted, they preferred the dissenting judgment of Kitto J. to that of Williams J. in the present case.

Here the payment was made to a company which carried on the business of wool growers, and the Australian Income Tax Assessment Act, 1936-49, although slightly different from the English Act, expressly envisages a business as a source of assessable income. This payment was made for no other reason than that the respondents had carried on the business of growing and supplying wool. They were not selected as the recipients of payment for any personal reason other than that they belonged to the class of those who had supplied participating wool. This payment, whether it was contemplated by the payors or expected by the payees from the beginning, is one which was made only

¹⁴ [1952] A.C. 215.

¹⁵ Unreported, Sept. 14, 1953.

because the respondents had carried on a particular business in a particular way at a particular time, and is in an income tax sense truly derived from the activities of carrying on a profit-making undertaking. The principle for which the appellant is contending stands whether the expectation existed or not. Nobody suggests that this payment is of a capital nature; it is a revenue payment, and is so treated in the respondents' accounts. And if it is income the fact that it is a voluntary or obligatory payment is not the criterion which decides whether it is a capital or an income payment. *Seymour v. Reed*¹⁶—the cricketer's benefit case—was a decision on its facts and not one which laid down any new principle. It is not in doubt here that the vast majority of the persons who became entitled to payment under the Act were growers of wool and in the business as growers, and the quality of the payment in their hands is not altered by the name by which they are designated—the quality of the payment is fixed by section 7 of the Act of 1948.

The fact that a payment was a personal gift in the sense that it was given personally to the supplier of the wool does not make the payment when it has in fact been received any the less received as a business receipt. The personal gift cases are of very little help, as each one turns on its own facts. But if payment is given substantially in respect of services rendered or goods supplied, a voluntary payment is as much subject to tax as the primary payment received in relation to those services. There is a complete distinction between the Australian and the English law in this connexion because of the wording of the Acts. In the United Kingdom the existence of a source in the year of assessment is essential; under the Australian Act the question is, is this income in the year in which it has come in, does it result from a source which at one time existed?

Lastly, the Wool Purchase Arrangement, the National Security (Wool) Regulations, 1939, the Disposals Plan and the Wool Realization (Distribution of Profits) Act, 1948, were in fact and by express statutory enactment a series of connected transactions which resulted in the distribution of profits arising from the transactions as a whole among the original suppliers of participating wool, who by supplying such wool had contributed to those profits. It is wholly artificial to regard them otherwise than as a series of connected transactions.

With regard to the second question submitted to the High

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¹⁶ [1927] A.C. 554.

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Court, the receipts are taxed as and when they come in, and they are properly included in the respondents' income for the year 1949.

Heyworth Talbot Q.C. following. Every case in this territory must depend on its own facts. The principle which governs whether a receipt is to be brought in is this: is the receipt or disbursement relating to or an incident of the trade—is it really in respect of the trade? And that is common to both cases, disbursement and receipt. It comes back in every case to the test laid down in the classic passage in Viscount Cave L.C.'s opinion in *British Insulated and Helsby Cables v. Atherton*.¹⁷ *Chibbett's* case¹⁸ has no bearing on the present case, and is really no authority for the proposition the High Court of Australia were upholding. Even if the payment had not been voluntary in that case the consequences would have been the same. The voluntary character of the payment in the present case is not the crucial fact. Two factors distinguish this case from *Chibbett's* case¹⁸: (i) there was here no break in the continuity of the trade which was being carried on—at the time of the receipt of the sum the trade of wool grower was being carried on by the respondents; and (ii) the existence of the particular source in the year of receipt is not a pre-requisite of liability as it is in English law. The submission for the appellant here would have been exactly the same if there had been no expectation or ground of expectation that the payment would be made. The ground on which the High Court of Australia relied on *Chibbett's* case¹⁸ is unsound.

If the payment is a trade receipt the only ground on which it can be excluded from the computation of profit is that it is a capital receipt. Any receipt which comes to a trader in relation to his trade is *prima facie* a receipt of the trade to be brought into account. *Beynon v. Thorpe*¹⁹ does not really help the case for the appellant. For the meaning of the expression "personal gift" as used in *Seymour's* case²⁰ and *Maslen's* case,²¹ see *Cooper v. Blakiston*,²² which shows that the expression may be used in two or three different senses in different contexts, and the question is what is the significance of the expression in an income tax case. The fact that the money in this case may go to some person in whose hands it is not taxable does not defeat the proposition that if it goes into the hands of someone who is carrying on a trade then it is taxable.

¹⁷ [1926] A.C. 205; 42 T.L.R. 187.

¹⁸ (1924) 9 Tax Cas. 48.

¹⁹ (1928) 14 Tax Cas. 1, 13.

²⁰ [1927] A.C. 554.

²¹ [1952] A.C. 215.

²² [1907] 2 K.B. 688, 694-5.

Douglas I. Menzies Q.C. (Australia) and *K. A. Aickin* for the respondents. It is conceded that if the payment in question is properly to be regarded as proceeds of the wool sold by the respondents by appraisalment in the years 1939-46, that is, compensation moneys for that wool, then the payment is assessable income in the year of receipt, 1949, and the judgment appealed from cannot be held to stand, however unjust that may seem, and reliance is placed on that circumstance as one of the factors showing that it is not assessable income. Having made that concession, the submissions for the respondents are, shortly: (a) if the payment in question is not part of the proceeds of that wool, i.e., it is not compensation moneys, it is not assessable income of the year 1949 or of any other year; (b) the payment is not of that character, i.e., it is not the proceeds of the wool submitted for appraisalment during those past years.

In the High Court of Australia the present appellant contended that the payment was in truth further proceeds of the wool which had been compulsorily acquired, some of it 10 years before, and that it was taxable as such. And the two dissenting judgments in the High Court which are in favour of this appellant proceeded entirely on the footing that the moneys which were paid under the Act were to be equated to proceeds of the wool, and that being so they were taxable in exactly the same way as if there had been a legal obligation to pay that money. Sir Hartley Shawcross based himself on the proposition that the payment was part of the money which took the place of the wool, and he used the same sort of language as was used in those two dissenting judgments. The payment of this money cannot be regarded as proceeds of the respondents' business unless it is proceeds of the wool compulsorily acquired and for which it was entitled to compensation. Unless it is part of the proceeds of the wool it cannot be part of the proceeds of the business. This is not a borderline case; it is properly to be described as a casual or fortuitous payment.

If it is said that it is a trading receipt even though it is not proceeds of wool, then that is in conflict with all the English cases where the gift was assessable, because it was so on the footing that what was paid did in fact become remuneration for services. The test in the type of case which deals with remuneration is: is what was paid part of the remuneration of the office; if it is, it is taxable; if not, it is not. The analogy to be got from that sort of case as applied to a trade or the sale of goods is, is it part of the price or is it not; that is a fair analogy and is the only

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way in which the cases dealing with remuneration can be made useful at all. The illustrations all bring one back to this: what was it that was promised? If what was paid was what was promised, then it had properly to be regarded as part of the price. If it was not, then it was not part of the proceeds, but something outside them, and not properly to be regarded at all as the proceeds of the business.

Coming now to the broad general proposition submitted for the appellant, it is contended that it is altogether too broad, and criticism is particularly directed to the words "if paid to him by reference or in relation to something he has done or is doing in the course of that trade." If the receipt is by somebody who is employed at a remuneration it is taxable if it forms part of his remuneration; if it is a receipt by somebody who is selling goods it is taxable or has to be brought into account if it forms part of the proceeds of sale—if it takes the place of the goods. There cannot be a trade receipt unconnected with the particular remuneration or reward which the person receives by virtue of that trade. The explanation of *Chibbett's* case²³ is in line with my proposition; the payment there was not for services; it was made to the respondents in consequence of the determination of a particular employment—it was compensation for loss of office and was not taxable. Using the phrase employed by Sir Hartley Shawcross, it was related to something which they had done in the course of their trade, and nevertheless was not taxable. The two clergy cases—*Blakiston v. Cooper*²⁴ and *Herbert v. McQuade*²⁵—are not authority for the generality of the appellant's broad proposition; they are authority for this, that even if a payment is voluntary, if it is received as part of a man's remuneration he is taxable thereon; they do not go beyond that. In *Beynon v. Thorpe*²⁶ the payment was not a supplement to a salary in respect of past services. *Corbett v. Duff*²⁷ is in complete line with my submission. However *Seymour v. Reed*²⁸ be looked at, the case was decided on the footing that the cricketer did not get that money as part of his remuneration, and it was held not taxable. The reason why the gifts in *Stedeford v. Beloe*²⁹ were not taxable was because they were not income, and it may be added, although clearly enough they were paid in a very real sense in respect of or in relation to past services. None of these cases is in one way

²³ 9 Tax Cas. 48, 60.

²⁴ [1909] A.C. 104.

²⁵ [1902] 2 K.B. 631.

²⁶ 14 Tax Cas. 1.

²⁷ [1941] 1 K.B. 730, 740.

²⁸ [1927] A.C. 554.

²⁹ [1932] A.C. 388.

or another to be regarded as decisive here, but all of them are in line with the view submitted for the respondents, and they are not consistent with the general proposition for the appellant that it is sufficient to attract tax if it is found that the recipient is paid in respect of or in relation to past services. There is thus no authority whatever to support the contention that the payment is taxable because it is the proceeds of the wool.

Although here in one sense—and without conceding too much—this was a trade receipt, nevertheless that is not sufficient unless the money is also given as part of the payment for that wool. It is not suggested that whether a payment is recurrent is decisive or conclusive, but it is a circumstance to be taken into account. This is not a gift which is proper to be regarded as part of the remuneration of the company for the wool which had been acquired from it 10 years previously by the Commonwealth.

Turning to the second point, namely, whether or not this payment is properly to be regarded as part of the proceeds of the respondents' wool, it is submitted: (1) The moneys distributed under the Act of 1948 were the moneys of the Commonwealth to which no person was in any way entitled. (2) The recipients were not chosen by reference to any activity carried on at the time of the passing of the Act or the making of the payment. (3) The recipients were chosen by reference to a past occurrence which was not always something done by the recipient himself or somebody whom the recipient represented. (4) The past occurrence was never wool growing, but always the supply of wool. (5) Except in special cases Parliament did not attribute any character to the payment that was made, but on a proper construction of the regulations and the Act the payment was a true gift.

With regard to *Maslen's* case,³⁰ it is important in considering that case to bear in mind that this Board was dealing with a payment which had been made, and the decision turned, it is submitted, on the character of that payment: when it was made it was not a partnership asset; it was a gift to the partners individually. If it was not to be regarded as a partnership asset, it could not be treated as income of the partnership. The short submission, for present purposes, on *Maslen's* case,³⁰ is that it is entirely inconsistent with the idea of treating this payment as the proceeds of wool: if it were the proceeds of wool, when it was paid to the partnership it would of course be a partnership asset, not something to which the partners were entitled individually.

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³⁰ [1952] A.C. 215.

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The point which the Board was making was that it was not a business receipt at all, and it is submitted that the present payment is not a business profit. The payment in the hands of the person who receives it is a true gift to him as an individual, which is not to be regarded as the proceeds or profit of any business; but when payment is made to a surviving partner the effect of section 10 (3) of the Act of 1948 is that he must account to his other partner for part of what he had received. It is not part of his taxable income. The conclusion to be reached from *Maslen's* case³¹ is directly in line with what one gets from the Act itself—that this payment is not in any sense proceeds of wool supplied.

The appellant submitted that the Wool Purchase Arrangement, the regulations and the Acts were all connected transactions which resulted in the distribution under the Act of 1948: that is a summary of what is put against the respondents. It is submitted that, even if it were true, it would be no reason for reversing the judgment of the High Court, and in any event it is not really applicable. It was the basis of the decision in *Ritchie's* case³² and of the dissenting judgments in the present case.

With regard to the question of expectation, the expectation relied on is something of this sort: an expectation that every supplier of shorn wool from the inception of the scheme would participate in any distribution of profits, whether under regulation 30 or otherwise, which were made by anybody out of wool which he had supplied. In the present case there could be no reliance upon any expectation, if any existed; they delivered their wool for appraisalment because they had to, not because they expected something more than the purchase price.

Coming now to the Commonwealth decisions on the Act of 1948: the actual decision in *Ritchie's* case³² is not in any way adverse to the respondents here, but there are some things said in the course of the judgments which are. The conclusion in *Ritchie's* case³² is accepted, but not the reasoning, which is inconsistent with *Maslen's* case.³¹ The source of the payment in question is not in any sense wool growing, but a distribution of profits directed by an Act of Parliament: *John Cooke & Co. Proprietary Ltd. v. The Commonwealth*³³; *Commissioner of Taxes v. Union Trustee Co. of Australia*³⁴; *Commissioner of Taxes v. British Australian Wool Realization Association*³⁵; *In the Estate*

³¹ [1952] A.C. 215.³² 84 C.L.R. 553.³³ (1922) 31 C.L.R. 394, 416, 419;

34 C.L.R. 269 (P.C.).

³⁴ [1931] A.C. 258, 268-9; 47

T.L.R. 203.

³⁵ [1931] A.C. 224; 47 T.L.R. 57.

of *W. O. Watt, decd.*³⁶ In any case the contention is that the distribution was not a further price for the wool, so, however it be regarded, it did not fall to be taxed. On the whole, the cases decided under the earlier scheme in relation to the First World War afford the appellant no comfort and, indeed, are in the respondents' favour and support their argument. There is nothing in all the facts of this case to justify the view either that the Commonwealth paid this sum as a supplementary price or that the respondents received it as such.

It was further said for the appellant that in any event the respondents should be taxed under the special provisions of section 26 (a) or (g). Section 26 (a) was put in to meet the decision of the House of Lords in *Jones v. Leeming*³⁷ and to establish the earlier decisions of the Australian High Court. Section 26 (a) would not be effective to tax a payment which did not otherwise bear an income character. So far as the express words of section 26 (a) are concerned, there is no profit-making scheme or undertaking carried on by the respondents which has produced this receipt. As to section 26 (g), there are three reasons for regarding this provision as inapplicable: (i) The payment is not in relation to the carrying on of any business at all. It is relative to a past transaction over and done with. Here the payment will be received whether or not the recipient is now carrying on any business and whether or not he ever carried on any business. (ii) The section contemplates payments to assist or encourage a person to carry on a business. The payment here in question is not of that character. (iii) The paragraph provides that the "bounty or subsidy" there referred to shall be deemed to be part of the proceeds of the business. The effect of the decision in *Maslen's case*³⁸ is that payments under the Act are not the assets of the business of the person to whom they are paid, and accordingly it cannot be said that such payments are part of the proceeds of that business. Section 26 (g) is not a basis for taxation of the respondents.

Upon the wording of the Act itself and upon authority, and particularly the construction in *Maslen's case*,³⁸ the payment in question is not proceeds of wool or a business receipt of any sort. It is a personal gift to the respondent company; the payment does not fall within any special taxing provision of the Income Tax Assessment Act, and the respondents are not subject to tax thereon. The judgment of the High Court should be affirmed.

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³⁶ (1925) 25 S.R., N.S.W. 467; 38 C.L.R. 12 (H.C.).

³⁷ [1930] A.C. 415; 46 T.L.R. 296.

³⁸ [1952] A.C. 215.

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Sir Hartley Shawcross Q.C. in reply. All that the Board had to decide in *Maslen's* case³⁸ was whether the assignment carried the payment—that is all that that case is authority for. There is not in the ratio decidendi of it anything which is inconsistent with the judgment in *Ritchie's* case³⁹ or inconsistent with the appellant's case in the present appeal. The "source" of the payment is the business of wool growing: *Commissioner of Taxes v. Union Trustee Co. of Australia*⁴⁰; *Bennett v. Marshall*⁴¹; *Bray v. Colenbrander*.⁴² The point is really unarguable. The payment in *Chibbett's* case⁴³ was within the language of the proposition enunciated in opening the appellant's argument of a capital nature. The real reason for the decision in that case was that that was a payment for the loss of the tree, the fruits of which had previously formed the taxpayer's income; in other words, it was a capital payment. The payment here is part of the proceeds of the wool; it was the proceeds of their business, which was the source; it is the fruit of their trade; after it was plucked off the tree it may have been left for a long time to ripen in the sun, but it did ripen, and having done so it still remains a fruit—here the time factor is irrelevant. One must look at the scheme as a whole, and regard this payment as forming part of the scheme. The true view of this payment is that it is extra proceeds of the sale itself. [Reference was made to *Commissioners of Inland Revenue v. Newcastle Breweries Ltd.*⁴⁴] The opening proposition for the appellant is certainly consistent with the subsidy cases: *Lincolnshire Sugar Co. v. Smart*,⁴⁵ on which reliance is placed. [*Short Bros. Ltd. v. Commissioners of Inland Revenue*⁴⁶ was also referred to.] There was a distribution contemplated and intended running through the regulations and ending up with the Act of 1948. All the regulations and statutes together with the Wool Purchase Arrangement and the Disposals Plan constitute a fasciculus of provisions for the acquisition of, and payment of compensation for, participating wool. With regard to expectation, that this payment would be made was the expectation of a reasonable man belonging to this class because of the circumstances in which the acquisition took place. There is no reason here why the court should be astute to find a break

³⁸ [1952] A.C. 215.³⁹ 84 C.L.R. 553.⁴⁰ [1931] A.C. 258.⁴¹ [1938] 1 K.B. 591; 54 T.L.R.

320; [1938] 1 All E.R. 93.

⁴² [1953] A.C. 503.⁴³ 9 Tax Cas. 48.⁴⁴ (1927) 12 Tax Cas. 927; 42 T.L.R. 185; (C.A.) 609; 43 T.L.R. 476.⁴⁵ [1937] A.C. 697; 53 T.L.R. 306;

[1937] 1 All E.R. 413.

⁴⁶ (1927) 12 Tax Cas. 955.

in the continuity of the scheme. In short, the payment does represent a part of the proceeds of the wool; but even if it is not capable of being so regarded, it is none the less an ingredient of the respondents' trading receipts to be brought into account in computing its trading profits for tax purposes, and that brings the appellant back to his original proposition, which is in fact wider than he need go. [Reference was also made to Konstam's Income Tax, 12th ed., para. 264.]

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1954. Jan. 21. The judgment of their Lordships was delivered by LORD MORTON OF HENRYTON. On November 30, 1949, the respondents received the sum of £22,851 as their share of an interim distribution made by the Australian Wool Realization Commission pursuant to the Wool Realization (Distribution of Profits) Act, 1948. The respondents were assessed to income tax on this sum as being part of their assessable income derived during the year ending December 31, 1949. The respondents objected to the inclusion of the said sum in the assessment, and the objection was treated as an appeal and forwarded to the High Court under section 187 of the Income Tax Assessment Act, 1936-1949. Sir Owen Dixon C.J. stated a case for the opinion of the Full Court of the High Court, under section 198 of the same Act.

The questions for the opinion of the Full Court were as follows:—“(i) Is the sum of £22,851 assessable income of the “appellant within the meaning of the Income Tax Assessment “Act, 1936-1949? (ii) If so, was the said amount part of its “assessable income in the year ended December 31, 1949, or in “some other and what year or years?”

The Full Court by a majority (McTiernan, Williams and Webb JJ.; Fullagar and Kitto JJ. dissenting) answered question (i) in the negative. The case was then remitted to the High Court and Kitto J., in accordance with the answer given by the Full Court, ordered that the sum in question be excluded from the assessable income of the respondents.

The commissioner appeals by special leave from the decision of the Full Court and the consequent order of Kitto J., and contends that the sum in question is taxable under section 25 of the Income Tax Assessment Act, which is in the following terms so far as material:—“(1) The assessable income of a tax-“payer shall include—(a) where the taxpayer is a resident—“the gross income derived directly or indirectly from all sources

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“whether in or out of Australia . . . which is not exempt
“income.”

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The commissioner also relied in the alternative upon the following clause of section 26:—“The assessable income of a taxpayer shall include—(a) profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit-making by sale, or from the carrying on or carrying out of any profit-making undertaking or scheme. (g) any bounty or subsidy received in or in relation to the carrying on of a business, and such bounty or subsidy shall be deemed to be part of the proceeds of that business.”

The relevant facts are fully stated in the case stated, and may be summarized for the purpose of the present appeal as follows:—The respondents own pastoral properties in the States of New South Wales and Queensland and on such properties they carry on (*inter alia*) the business of wool growers. This business was carried on by the respondents during the years 1939 to 1946 inclusive, and the wool grown by the respondents in the seven wool seasons 1939–40 to 1945–46 inclusive was acquired by the Commonwealth pursuant to the National Security (Wool) Regulations (Statutory Rules 1939, No. 108). These regulations were made for the purpose of carrying out an arrangement (hereafter referred to as “the Wool Purchase Arrangement”) made between the United Kingdom Government and the Commonwealth Government at the outbreak of war in 1939, by which the United Kingdom Government purchased all wool produced in Australia for the period of the war and one full wool year thereafter, except wool required for the purpose of woollen manufacture in Australia. One of the terms of the Wool Purchase Arrangement was that the United Kingdom Government and the Commonwealth Government would divide equally any profit arising from the resale outside the United Kingdom of wool purchased by the United Kingdom Government under the arrangement.

A Central Wool Committee and also a State Wool Committee for each State was set up by the Wool Regulations. The following regulations should be set out in full:—

“WOOL ACQUIRED BY COMMONWEALTH WHEN SUBMITTED FOR
APPRAISEMENT

“15.—The sale of wool shall be by appraisalment under these regulations and the property in every parcel of wool submitted for appraisalment shall pass to the Commonwealth when the

“ final appraisalment thereof is completed in the manner prescribed by the instructions of the Central Wool Committee governing appraisalment.

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“ TABLE OF LIMITS OF APPRAISEMENT TYPES

“ 16.—For the purpose of appraising wool according to description the Central Wool Committee shall cause to be prepared a table of limits or lists of appraisalment types of wool.

“ REGARD TO BE HAD TO PRICE IN PREPARATION OF TABLE OF LIMITS

“ 17.—In the preparation of such a table of limits regard shall be had to the price payable by the Government of Great Britain to the Government of the Commonwealth under the arrangement between those Governments and the limits shall be so fixed as to ensure that the price per pound payable by the Government of Great Britain for the wool of any wool year will not be exceeded by the average price per pound of the total payments made pursuant to the appraisalment of that wool.

“ STATE WOOL COMMITTEES TO CARRY OUT APPRAISEMENT

“ 18.—Each State Wool Committee shall under the directions of the Central Wool Committee carry out all arrangements for the appraisalment of wool.

“ ALL WOOL TO BE SUBMITTED FOR APPRAISEMENT

“ 19.—(1) All wool shall be submitted for appraisalment.

“ (2) If any person owning or controlling or having possession of any wool fails to submit it for appraisalment he shall be guilty of an offence.

“ PURCHASE OF WOOL FOR WOOLLEN MANUFACTURE

“ 23.—(1) Any person desirous of obtaining wool for the purpose of woollen manufacture in the Commonwealth may apply to the Central Wool Committee for authority to purchase wool and the Central Wool Committee may authorize the purchase of the wool subject to such conditions as it may think fit to impose.

“ FINANCE

“ 30.—(1) All moneys payable by the Government of Great Britain under the arrangement made by that Government with the Commonwealth for acquiring Australian wool shall be received by the Central Wool Committee and out of such

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“moneys the Central Wool Committee shall defray all costs, charges and expenses of administering these regulations, and make the payments for wool to the suppliers.”

“(2) Any moneys which may be received by the Central Wool Committee from the Government of Great Britain under or in consequence of such arrangement over and above the purchase price payable by such Government thereunder for the wool and any surplus which may arise shall be dealt with as the Central Wool Committee shall in its absolute discretion determine.”

In pursuance of the regulations the Commonwealth acquired the whole of the Australian wool clip in each year during the war and the suppliers of the wool duly received the whole of the compensation moneys to which they were legally entitled under the regulations. It is unnecessary, for the present purpose, to refer to the “flat rate adjustment” and the “retention moneys” which are mentioned in the stated case.

The United Kingdom Government resold part of the wool purchased by it to other countries and established in its books an account entitled “Divisible profits account” from which could be ascertained the profit divisible equally between the United Kingdom Government and the Commonwealth Government under the Wool Purchase Arrangement.

Paragraph 26 of the stated case states as follows, so far as material for the present purpose: “For the purpose of the administration of the regulations there was a basic distinction which separated all wool into two categories. This is the distinction between wool obtained from shearing of live sheep, i.e. ‘shorn wool,’ and wool obtained from the skins of slaughtered sheep, i.e. ‘skin wool.’ . . . From the inception of the Wool Purchase Arrangement the Central Wool Committee contemplated that the Commonwealth Government’s share of any profit to arise should, if there were any profit, be paid to the wool growers, i.e. the suppliers of shorn wool and not to the suppliers of skin wool. Shorn wool was therefore classified as ‘participating wool,’ i.e. wool the suppliers of which were, according to the intention of the Central Wool Committee, entitled to participate in the Commonwealth Government’s share of any profit to arise under the Wool Purchase Arrangement, . . . The suppliers of skin wool . . . were not intended by the Central Wool Committee to participate in any profit. Skin wool was, therefore, listed as ‘non-participating.’ Accordingly, all wool submitted for appraisal was, in addition to being appraised according to type

“ and yield under the Table of Limits, listed in the broker’s
 “ appraisal catalogues as ‘ participating ’ or ‘ non-participa-
 “ ting.’ ”

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The wool submitted by the respondents was listed as “ par-
 “ ticipating ” wool, and their Lordships think it can fairly be
 inferred that this fact, coupled with the terms of regulation 30
 (2), must have led the respondents to hope, if not to expect, that
 the Central Wool Committee might make further payments to
 them in exercise of the discretion vested in that Committee by
 regulation 30 (2).

For a summary of the subsequent events leading up to the
 passing of the Wool Realization (Distribution of Profits) Act,
 1948, it is convenient to quote three paragraphs of the case
 stated:—

“ 30.—As a result of negotiations conducted in the year 1945,
 “ an agreement was reached between the United Kingdom
 “ Government, the Commonwealth Government and the Govern-
 “ ments of South Africa and New Zealand upon a plan for the
 “ winding up of the wartime wool purchase arrangements and
 “ the disposal of the large stocks of wool held by the United
 “ Kingdom Government without unduly disturbing the marketing
 “ or depressing the price of future wool clips. The agreement so
 “ reached was called the ‘ Disposals Plan ’ and is set out in the
 “ Schedule to the Wool Realization Act, 1945 (Act No. 49 of
 “ 1945). Pursuant to that agreement, the United Kingdom
 “ Government arranged for the formation of United Kingdom—
 “ Dominion Wool Disposals, Limited, a company incorporated in
 “ the United Kingdom (commonly called the ‘ Joint Organiza-
 “ tion ’) and each of the other governments, set up by a sub-
 “ sidiary of the Joint Organization. The Australian subsidiary
 “ is the Australian Wool Realization Commission set up by the
 “ Wool Realization Act, 1945.

“ 31.—The Joint Organization was established in 1945 and
 “ commenced operations as from August 1, 1945. The task of
 “ the Joint Organization was the disposal of the accumulated
 “ surplus of Dominion wool purchased during the war by the
 “ United Kingdom Government. The stocks held by the United
 “ Kingdom Government on August 1, 1945, and taken over by
 “ the Joint Organization on that date amounted to 10,407,000
 “ bales of which 6,796,000 bales were Australian wool purchased
 “ from the Commonwealth by the United Kingdom Government
 “ under the Wool Purchase Arrangement. It was agreed that
 “ the three Dominion Governments concerned should each

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“ acquire a half interest in the stocks of wool from their respective Dominions held by the United Kingdom Government and that the value of such stocks for the purposes of the Disposals Plan, be taken as the original cost of the wool as appearing in the United Kingdom Government books, less the accumulated profits from sales of wool outside the United Kingdom, i.e. the cost of the wool held in store less the balances standing in the Divisible profits accounts. Each Dominion Government was to acquire on this basis a half interest in the stocks of the wool purchased from it and held by the United Kingdom Government on August 1, 1945, and was to receive, after due allowance for operating expenses, half the net proceeds of sale of that wool upon its being sold by the Joint Organization. Payment for this half interest was to be made by each Dominion Government to the United Kingdom Government within four years and each Dominion Government's half share in the proceeds of sale by the Joint Organization was to be applied in payment of the amount so payable.

“ 32.—The Disposals Plan provided that the Wool Purchase Arrangement should terminate on July 31, 1945, but further provided (in Part I, paragraph 9 thereof) that for the wool year 1945/46, the first year of the Disposals Plan (known as the interim period and terminating on July 31, 1946), the method of purchase of wool—viz., appraisalment and acquisition—which had operated during the preceding six years, should be continued and (in Part III, paragraph 6) that the United Kingdom Government would be responsible for financing the purchase of all the wool so acquired but that the management and sale of the 1945/46 wool clip should be entrusted to the Joint Organization and that such wool should be dealt with by the Joint Organization in the same manner as the stocks taken over by it as at August 1, 1945. In Australia the acquisition of the 1945/46 wool clip was administered by the Central Wool Committee until November 15, 1945, upon which date the Australian Wool Realization Commission took over. The system of acquisition upon appraisalment continued until June 30, 1946, and in the following wool season the sale of wool by auction was resumed—the first of such auctions being held in September, 1946. Thereafter all wool, both from new clips and stocks held by the Joint Organization, was disposed of by auction or private sale. Certain small quantities were bought in by the Joint Organization at reserve prices when other bids at auction did

“not reach the reserves established pursuant to the Disposals Plan.”

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Section 9 (3) of the Act of 1945 provided that the Commission “shall have and perform all the duties, and shall have and may exercise all the powers, authorities and functions, of the Central Wool Committee under—(a) the National Security (Wool) Regulations; . . . and for that purpose—(i) the Commission shall, by force of this Act, be substituted for, and be deemed to be, the Central Wool Committee; (ii) the assets of the Central Wool Committee shall, by force of this Act, be vested in the Commission; (iii) all rights, obligations and liabilities which, immediately prior to the commencement of this Act, were vested in or imposed on the Central Wool Committee shall, by force of this Act, be vested in or imposed on the Commission; . . .”

Thus the Australian Wool Realization Commission was the true successor of the Central Wool Committee set up under the Regulations of 1939, and section 10 provided that any reference in the 1939 Regulations to the Wool Purchase Arrangement “shall include or shall be deemed at all times, on or after August 1, 1945, to have included a reference to the Disposals Plan.”

The operations of the Joint Organization in respect of Australian wool resulted in large profits, and it became necessary for the Commonwealth to decide what ought to be done with these profits. The Wool Realization (Distribution of Profits) Act, 1948, is entitled “An Act to provide for the distribution of any ultimate profit accruing to the Commonwealth under the Wool Disposals Plan, and for other purposes.” Section 18 of the Act directed the preparation of a list showing (a) the persons who, in the opinion of the Commission (i.e., the Australian Wool Realization Commission) were entitled to share in distributions under this Act; and (b) the appraised values of the wool in relation to which each such person was, in the opinion of the Commission, so entitled. Section 4 contained a number of definitions, of which the following should be quoted:—

“‘appraised value’, in relation to wool, means the value at which the wool was appraised under the National Security (Wool) Regulations; . . .

“‘declared amount of profit’ means an amount which has been specified in a notice published in the ‘Gazette’ in pursuance of section six of this Act;

“‘participating wool’ means wool appraised under the National Security (Wool) Regulations (whether under those

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“ Regulations when in force under the National Security Act, 1939, or that Act as amended, or under those Regulations when in force under the Wool Realization Act, 1945, or that Act as amended), being wool which was listed as participating wool in the appraisalment catalogue used by the appraisers for the purpose of that appraisalment; . . .

“ ‘ the net profit ’ means the amount remaining after deducting from the wool disposals profit the expenses and charges of the Commission in administering this Act, other than commission payable to brokers; ”

Section 6 (1) provides : “ At any time before the wool disposals profit has been ascertained, the Minister may, with the approval of the Treasurer and after consultation with the Commission, and if he is satisfied that the financial position under the Disposals Plan justifies his so doing, by notice published in the ‘ Gazette,’ declare an amount to be available for distribution under this Act out of the expected net profit.”

Part III of the Act is headed “ Persons Entitled,” and section 7 is as follows : “ 7.—(1) Subject to this Act, an amount equal to each declared amount of profit shall be distributed by the Commission in accordance with this Act.

“ (2) There shall be payable by the Commission, out of each amount to be distributed under this Act, in relation to any participating wool, an amount which bears to the amount to be distributed the same proportion as the appraised value of that wool bears to the total of the appraised values of all participating wool.

“ (3) Subject to this Act, an amount payable under this Act in relation to any participating wool shall be payable to the person who supplied the wool for appraisalment.

“ (4) Where two or more persons jointly supplied participating wool for appraisalment, those persons shall, for the purpose of determining their claims in relation to that wool in any distribution under this Act, be treated as one person.”

Section 8 contains a provision with regard to wool which was submitted by a dealer for appraisalment, and is not material for the present purpose. Sections 9 to 14 inclusive deal with the situation which may have arisen by reason of various events, such as the death or bankruptcy of the person who supplied the wool for appraisalment, and section 10 should be quoted in full, as it was the section which came under consideration in *Maslen’s* case,¹ hereafter mentioned. “ 10.—(1) Where participating wool

¹ [1952] A.C. 215.

“ was supplied for appraisalment by a company which is defunct,
 “ an amount which would otherwise be payable under this Act
 “ to the company may be paid by the Commission to such person
 “ as appears to the Commission to be justly entitled to receive it.
 “ (2) Where participating wool was supplied for appraisalment by
 “ a partnership which has been dissolved, an amount which would
 “ otherwise be payable under this Act to the partnership may
 “ be paid by the Commission to any former partner or partners
 “ (including the personal representatives of a deceased former
 “ partner). (3) Where an amount has been paid in pursuance of
 “ this section, the rights, duties and liabilities of the person to
 “ whom it is paid in respect of the amount shall be the same as
 “ if it were part of the proceeds of a sale of the wool by the
 “ company or partnership, made at the time of the supply of the
 “ wool for appraisalment.”

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The sum of £22,851 now in question was paid to the respondents under section 7 of the Act of 1948. They are still carrying on business as suppliers of wool.

Counsel for the appellant submitted that the sum in question was, in the hands of the respondent, a trade receipt of an income nature, and relied strongly on *Ritchie v. Trustees Executors and Agency Co. Ltd.*² In that case the High Court had to consider a case in which the trustees of a will had carried on business on a pastoral station under a power in the will and had from time to time submitted “ participating ” wool for appraisalment under the Regulations of 1939. They received a sum of £4,770 under the provisions of the Act of 1948, and the question before the High Court was whether this sum should be treated as capital or income in the hands of the trustees.

The Full Court of the Supreme Court of Victoria had held that the trustees “ should hold and deal with the moneys as a “ receipt of an income nature in relation to the Murray Downs “ station-property business, to be brought into account accordingly and dealt with in accordance with the trusts of the will “ of Charles Campbell deceased relating to the station “ properties,” and the High Court unanimously affirmed this decision. It is true that the minds of the judges of the High Court were not specifically directed to the question of income tax, but there are passages in the judgment of the court which are so important for the present purpose that they must be quoted in full. The court said³: “ For the purpose of determining whether the payment received by the trustees of the will

² (1951) 84 C.L.R. 553.

³ Ibid. 576-7.

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“ from the Wool Realization Commission should be regarded as
 “ capital or income, and if income to what period of enjoyment
 “ it is attributable, it has been thought important to trace from
 “ the beginning the relevant steps in the extensive and complex
 “ governmental transaction which the distribution of profit in
 “ question brings almost to an end. If this were not done it
 “ would be easy to misconceive the relation of the supply of wool
 “ for appraisement to the wool disposals profit and to the right
 “ conferred by the Act to share in its distribution in accordance
 “ with the appraisement value of the wool submitted. It is clear
 “ that from the beginning the distribution, in whole or in part,
 “ of the Australian share of any surplus arising on divisible
 “ profits account was contemplated. The decision was taken
 “ administratively that skin wool should be excluded and wool
 “ was accordingly submitted for appraisement and appraised as
 “ participating and non-participating. That of course implied
 “ that the basis of distribution would be appraised value of the
 “ wool submitted. But it was equally clear that no legal right
 “ to participate in a distribution of profits was conferred upon
 “ suppliers of participating wool, that is, until the enactment
 “ of the Wool Realization (Distribution of Profits) Act, 1948. In
 “ the beginning it was made to depend wholly on the discretion
 “ of the Central Wool Committee. It is conceivable that a court
 “ interpreting the regulations might have implied limitations
 “ upon the manner in which the discretion was exercisable, but
 “ even so no right to participate could possibly have been
 “ imputed, particularly having regard to the reasons upon which
 “ were based the decisions in *John Cooke & Co. Pty. Ltd. v.*
 “ *Commonwealth*.⁴ No payment to the supplier of wool, beyond,
 “ at all events, appraised value (whether appraised value sim-
 “ pliciter or adjusted to flat rate is not material) was required by
 “ the regulations; all else remained a matter of administration.
 “ But courts should not be unmindful of the fact that administra-
 “ tive measures and understandings may, according to circum-
 “ stances, raise an expectation almost as assured of realization
 “ as if it rested upon a foundation of legal right. Section 9 (3)
 “ of the Wool Realization Act, 1945–1950, transferred the powers
 “ of the Central Wool Committee to the Wool Realization Com-
 “ mission and the Wool Realization (Distribution of Profits) Act,
 “ 1948, removed the whole matter of the disposal of profits from
 “ the province of administrative discretion and placed the dis-
 “ tribution upon a defined statutory basis. Not only did it

⁴ (1922) 31 C.L.R. 394; (1924) 34 C.L.R. 269.

“convert the expectations which existed into claims which though not actionable (see section 28) became claims with a legal foundation; it also provided an appropriate and definitive rule for a number of situations of difficulty arising from death, bankruptcy, change of persons acting in a representative capacity and dissolution of partnerships and of companies, it invalidated assignments and it prescribed the machinery of distribution. The rule which the legislature adopted for cases in which one of the events mentioned occurred between the supply of participating wool for appraisalment and the distribution varied in expression, but in effect it was to require the moneys to be dealt with as if the supply of wool for appraisalment had been a sale made at the time of such supply and the amount payable out of the distributable profits were part of the proceeds of sale. This of course does not mean that there should be any notional change in the date of receipt, only that, treating the payment as received on the actual date of receipt it should for the specified purposes be regarded as though it were a payment, that is, a delayed or deferred payment of part of the proceeds of a sale of the wool made at the time of appraisalment. None of these provisions applies to the facts of the present case. The trustees themselves submitted the wool for appraisalment acting under trusts established long before the Wool Purchase Arrangement, the settlement preceded it and there is no question of an assignment within section 29.”

After setting out certain contentions advanced on behalf of the parties interested in capital, the court proceeded⁵: “The course pursued to give effect to the Wool Purchase Arrangement by the acquisition of wool from the grower must be considered as an entirety. The receipt of the payments is an actual consequence of the submission of wool for appraisalment. It is a consequence which from the beginning was contemplated as a contingent result of submitting the wool for appraisalment. Legally it was left for the time being to the discretion of the Central Wool Committee. But administrative arrangements were made from the beginning by that body in readiness for the contingency becoming actual, by determining what wool should share and what should be excluded and by expressly appraising on that footing the wool submitted.

“The two statutes, the Wool Industry Fund Act, 1946, and the Wool Realization (Distribution of Profits) Act, 1948, are not disconnected. Together they take up the discretion which

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“ regulation 30 (2) vested in the Central Wool Committee, a
“ body superseded under the Wool Realization Act, 1945–1950,
“ and proceed to deal with the subject legislatively instead of
“ administratively. The one statute says what part of the funds
“ governed by that sub-regulation should be applied in the
“ language of the Act for purposes associated with the wool
“ industry. The other statute gives legislative effect to the
“ expectation that the amounts arising upon divisible profits
“ account under the Wool Purchase Arrangement with the
“ United Kingdom should be distributed among growers as a
“ percentage of the appraised value of the participating wool
“ submitted and it provides the machinery for the purpose.

“ It is, of course, true that the Parliament, in the exercise of
“ its legislative power, could have dealt in any manner it chose
“ with the fund. But that legal fact does not determine the
“ character or the consequences of the course which Parliament
“ actually took or the nature, as between capital and income, in
“ trusts for successive interests, of the amounts distributed.
“ They constitute receipts resulting from the operations of wool-
“ growing. As possible or contingent receipts they were in con-
“ templation when the appraisements were made. The title
“ to receive them when in the end it is placed on a legal basis
“ consists in the submission of shorn wool for appraisement
“ for the purposes of the Wool Purchase Arrangement. The
“ amount is a percentage of the appraised value of the wool so
“ submitted. The source of the distribution is in effect the fund
“ arising under the divisible profits clause in the Arrangement.
“ When the Wool Realization (Distribution of Profits) Act, 1948,
“ speaks of the rights, duties and liabilities of a person made a
“ payee in respect of wool submitted by a defunct company,
“ a dissolved partnership or a deceased person being the same
“ as if the amount were part of the proceeds of a sale of the
“ wool by the company, partnership or deceased person at the
“ time of the supply of the wool for appraisement, the purpose is
“ not to require an assumption entirely departing from the truth
“ but simply to bring the situation within an express definition
“ which would remove all doubts of its character. It may possibly
“ be true that the compulsory submission of wool for appraisement
“ did not amount to a ‘ sale ’ and that whatever the transaction
“ be called the word ‘ proceeds ’ could properly be used only of
“ the appraised value or the appraised value adjusted to flat-rate
“ parity, because all else depended entirely on administrative or
“ legislative discretion. But, apart from questions of legal right

“and legal definition, there is no closer practical analogy than that which sections 10 (3) and 11 (b) adopt, viz., the proceeds of a sale of the wool. They are receipts resulting from the operations of growing wool.”

It is obvious that these views, expressed with so much force and clarity, have a strong bearing upon the present appeal. There are no circumstances which differentiate the payment made to the trustees in *Ritchie's* case⁶ from the payment made to the respondents in the present case. When the trustees and the respondents respectively received these payments they were still carrying on the business in the course of which they had submitted wool for appraisalment in the years 1939 to 1946. Thus *Ritchie's* case,⁶ like the present case, was one to which the special provisions in sections 8 to 14 inclusive of the Act of 1948 did not apply. Moreover, their Lordships do not think that the decision in *Ritchie's* case⁶ rested upon any equitable principles applicable as between life tenant and remainderman; it rested simply upon the character of the payment—was it capital or income?

Before commenting further on the judgment in *Ritchie's* case,⁶ their Lordships will turn to *Perpetual Executors Trustees & Agency Co. (W.A.) Ltd. v. Maslen*,⁷ as the three judges forming the majority in the High Court in the present case undoubtedly attached great importance to *Maslen's* case⁷ and to certain observations made by their Lordships' Board in the course of its judgment. The facts in *Maslen's* case⁷ were as follows: One Connolly, who died on December 28, 1946, had until June 30 of that year been in equal partnership with one Laffer in a pastoral business in Western Australia known as the Mardathuna Pastoral Co. By a deed dated June 17, 1946, and operating from July 1 of that year, Connolly assigned the beneficial interest of his half share in the company to the Maslens in equal shares as tenants in common. Since the question as to what the property assigned included was in dispute between the parties, the exact terms in which the assignment was made should be quoted in so far as they are material.

By clause 1 of the assignment it was provided that Connolly assigned to the Maslens “all his right title and interest in . . . (d) . . . the benefit of all contracts and engagements and book debts to which Patrick Andrew Connolly and Claude Ashely Laffer may be entitled in connexion with the said business together with all other assets of the said business.” The said

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⁶ 84 C.L.R. 553.

⁷ [1952] A.C. 215.

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business referred to was that of the company. By another deed dated October 2, 1946, Laffer assigned his half share to one of the Maslens. Laffer's assignment was in no wider terms than that of Connolly's and need not be further referred to.

As a result of the Act of 1948, two sums became payable in respect of "participating" wool supplied for appraisement, prior to June 30, 1946, by Messrs. Connolly and Laffer. The Maslens on the one hand, and Connolly's and Laffer's representatives on the other, claimed to be entitled to the two sums, and in those circumstances the latter took out originating summonses in the Supreme Court of Western Australia for the purpose of ascertaining to whom the sums were properly payable. In the Supreme Court of Western Australia Walker J. decided in favour of the plaintiffs' claim, but the High Court (Latham C.J. and Kitto J.; Fullagar J. dissenting) reversed that decision, and held that the assignees were entitled. On appeal their Lordships' Board, in agreement with Walker J. and Fullagar J., took the view that the sums in question did not pass under the assignment.

The issue before the Board (omitting one question not material for the present purpose) was thus stated in the judgment⁸: "What is the true destination of these two sums and any other sums which may be paid by the Commission in respect of participating wool furnished by the partnership of Messrs. Connolly and Laffer?" It is important to see exactly what were the contentions put before the Board and how the Board chose between these contentions. The contentions and the choice are set out as follows⁹:—

"The determination of the matters in issue in Australia, therefore, which are submitted to their Lordships' Board, falls to be decided on the true construction of the provisions of Part III of the Act. The appellants rest their argument on the terms of section 7 (3) and say that the share of the sums in dispute which they claim are payable in relation to participating wool, and accordingly payable to the persons who supplied it for appraisement. Messrs. Connolly and Laffer are the persons who supplied the wool jointly and are to be treated as one person (section 7 (3) and (4)). And accordingly the wool was supplied by a partnership which has been dissolved and the amount is properly payable to any former partner or partners, including the personal representatives of a deceased partner. The sums in dispute were, they say, properly payable

⁸ [1952] A.C. 225.

⁹ Ibid. 228-9.

“ to either of the claimants as representatives of Mr. Connolly
 “ or as representatives of Mr. Laffer, but not to the respondents.

“ The respondents, on the other hand, draw attention to the
 “ fact that the provisions of section 7 (3) ” (in [1952] A.C. p. 228,
 section 10 (3) is referred to, but this is an obvious misprint) “ are
 “ stipulated to be subject to the Act, and rely on the terms of
 “ sections 10 and 11 as distinguishing this from a case where a
 “ living partner claims the benefit of the payment. Section 10
 “ (3), they say, no doubt authorizes payment, where a partner-
 “ ship is dissolved, to a former partner or his representatives.
 “ But when the money has been paid to him, his duties in
 “ dealing with it are prescribed by sections 10 and 11. Those
 “ duties, they contend, are to treat the payment as part of the
 “ proceeds of the sale of the wool made at the time of its supply
 “ for appraisalment, i.e., as if the supplier was entitled to the
 “ payment at that time. An identical obligation is, they main-
 “ tain, imposed on a personal representative under section 11,
 “ since he is enjoined not to treat the sum paid as part of the
 “ personal estate but as having the quality of the proceeds of a
 “ sale made by the deceased supplier at the time when he
 “ furnished the wool for appraisalment.

“ Their Lordships have to choose between these two construc-
 “ tions. Obviously the recipient, whether he be a former partner
 “ or a personal representative, cannot keep the money for himself.
 “ If he be a member of a dissolved partnership, he must account
 “ to his former partner, and if he be a personal representative,
 “ he must treat the money as part of the estate which he is
 “ administering. But do the provisions go further and stipulate
 “ that it is to be dealt with as if it were the result of a contract
 “ or debt which came into existence when the wool was supplied
 “ for appraisalment? So to construe the wording would be to do
 “ violence to the admitted fact that it is a gift. No doubt the
 “ wording might be clearer, but *prima facie* the sums received
 “ are payable to the supplier and it is for the claimants to
 “ establish the contrary.

“ The correct view, in their Lordships’ opinion, is that it is a
 “ true gift to the supplier of the wool. It is not, and never was,
 “ part of the assets of the partnership.”

In that passage the Board rejects the suggestion that
 section 10 (3) of the Act of 1948 has the result that a debt,
 equal to the amount of the subsequent payment, must be
 regarded as having been owed to the suppliers of the wool as
 from the date on which they supplied it. The suggestion thus

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rejected was the basis of the claim put forward by the assignees. They had contended that a debt of this amount must be deemed to exist at the date of supply, and as that date was prior to the assignment of 1946 the debt must be deemed to have been included in the assets assigned to them. The rejection of that suggestion, and the consequent refusal of that claim, was the only decision given by the Board in *Maslen's* case.¹⁰

It will at once be seen that on this footing the decision in *Maslen's* case¹⁰ has no bearing upon the problem arising in the present case. There are, however, certain passages in the judgment upon which Mr. Menzies, for the respondents, strongly relied as indicating that sums paid to suppliers under the provisions of the Act of 1948 are not assessable income in the hands of the recipients. In the passage already quoted, the Board described the payment then in question as a "true gift" to the suppliers, and later it was described as "a personal gift to the parties concerned."¹¹ In their Lordships' view the word "gift" does not assist the respondents. It was used in order to negative the idea that a *debt* was deemed to arise at the time when the wool was submitted for appraisalment. Undoubtedly the Commonwealth was not bound to pay this sum to the suppliers. The payment was a voluntary one, though it fulfilled a well-founded hope or expectation on the part of the suppliers; but it is well settled that a voluntary payment may be subject to income tax in the hands of the recipient. See, for instance, *Blakiston v. Cooper*.¹² Nor does the use of the adjective "personal" assist the respondents, having regard to the circumstances in which it was used. The mind of the Board in *Maslen's* case¹³ was in no way directed to income tax questions, and it is inconceivable that by using this adjective their Lordships meant to suggest that the payment in question was awarded to the suppliers because of their exceptional personal merits or sterling characters. It was awarded to them simply because they had supplied wool for appraisalment, and section 7 of the Act of 1948 makes this abundantly clear. Their Lordships were, of course, quite aware of the distinction, for income tax purposes, between a gift "peculiarly due to the personal qualities" of the recipient (see *Blakiston v. Cooper*¹⁴) and a payment for goods or services, and they cannot have meant to suggest that the payment in question

¹⁰ [1952] A.C. 215.¹¹ *Ibid.* 230.¹² [1909] A.C. 104; 25 T.L.R. 164.¹³ [1952] A.C. 215.¹⁴ [1909] A.C. 104, 107.

was of the former kind, as such a suggestion would be inconsistent with the plain words of section 7 (3).

Mr. Menzies relied also upon the sentence "It [the payment] is not, and never was, part of the assets of the partnership" as indicating that the payment to the present respondents could not be said to be a trade receipt. Their Lordships cannot accept this suggestion. In their view the sentence means no more than this, that the partnership between Connolly and Laffer had been dissolved before the payment was made, and the Board was again rejecting the argument that a book debt must be deemed to have come into existence during the continuance of that partnership.

Finally, their Lordships can find nothing in the judgment in *Maslen's case*¹⁵ to indicate that the Board disapproved of the reasoning or of the decision in *Ritchie's case*.¹⁶ The problem in *Maslen's case*¹⁵ was to identify the recipient of the sum then in question, not to decide whether that sum bore the character of capital or income in the hands of the recipient. It appears from the transcript of the proceedings in *Maslen*,¹⁵ though not from the report in [1952] A.C., that *Ritchie's case*¹⁶ was cited in the course of the argument; and their Lordships entertain no doubt that if the Board in *Maslen's case*¹⁵ had thought that *Ritchie's case*¹⁶ bore upon the question in issue, and was wrongly decided, the latter case would have been mentioned in the judgment.

It was pointed out by Sir Hartley Shawcross that there are phrases in the judgment in *Maslen's case*¹⁷ which support the argument for the appellant. The payment is described as "the extra proceeds,"¹⁸ "the extra profit" and "the extra sum paid."¹⁹ Their Lordships recognize that these phrases might be read as indicating that in the view of the Board the payment then in question should be regarded as an additional sum added to the compensation already paid for the wool compulsorily acquired, but it would not be right to attach too much weight to the wording of phrases used alio intuitu. In their opinion neither the decision in *Maslen's case*,¹⁷ nor the reasoning on which that decision was based, afford any assistance in the problem now arising for decision. They have dealt with the case very fully because of the importance attached to it by the majority of the High Court in the present case, and because they realize that

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¹⁵ [1952] A.C. 215.

¹⁶ 84 C.L.R. 553.

¹⁷ [1952] A.C. 215.

¹⁸ Ibid. 229.

¹⁹ Ibid. 230.

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some passages in the judgment, divorced from their context, are open to misconception.

What, then, is the nature of the payment now in question, and in what capacity did the respondents receive it? Having regard to the whole history of the matter, beginning with the Wool Purchasing Arrangement and the Regulations of 1939, continuing with the submission of wool for appraisalment by the respondents and the classification of that wool as participating wool, and ending with the payment of the sum in question pursuant to section 7 of the Act of 1948, their Lordships come to the conclusion that the payment must be regarded as an additional payment voluntarily made to the respondents for wool supplied for appraisalment or, if the compulsory acquisition can properly be described as a sale, a voluntary addition made by the Commonwealth to the purchase price of the wool. Their Lordships are in agreement with the reasoning and the decision in *Ritchie's case*,²⁰ and the following passages are particularly germane to the present problem²¹:—" They (the payments) constitute receipts resulting from the operations of wool-growing. " As possible or contingent receipts they were in contemplation " when the appraisements were made. The title to receive them, " when in the end it is placed on a legal basis, consists in the " submission of shorn wool for appraisalment for the purposes of " the Wool Purchase Arrangement . . . They are receipts " resulting from the operations of growing wool."

The respondents were in business as wool suppliers at all material times, and the payment was made to them, not because of any personal qualities, but because they, among others, supplied participating wool. They supplied the wool in the course of their trade and this further payment was made to them because they supplied it. In the present case the respondents were still trading when the payment was made. It was in their hands a trade receipt of an income nature. Their Lordships express no opinion as to the proper description of the payment in the hands of a payee who was not trading at the date of the payment, as this case is not before the Board.

Mr. Menzies contended that even if this would have been the result, had the distribution been made by the Central Wool Committee in the exercise of its discretion under regulation 30 (2) of 1939, a different situation had arisen, by reason of intervening events, before the distribution was in fact made. This contention, and the answer to it, are fully set out in the

²⁰ 84 C.L.R. 553.

²¹ Ibid. 580.

judgments of the minority of the High Court, and their Lordships agree with that answer. There is, in their view a chain of events which sufficiently connects the payment of the £22,851 in November, 1949, with the supply of wool for appraisalment in 1939-1946. It is true that one of these events was a discretionary act on the part of Parliament, but that act was in effect the final link in the chain, since it directly associated the payment with the participating wool supplied for appraisalment, first by directing payment to the suppliers, and secondly, by making the amount of the payment depend upon the proportion which the appraised value of the participating wool supplied by each supplier bore to the total of the appraised value of all participating wool.

For these reasons, which are in substance the same as the reasons given by Fullagar and Kitto JJ. in the High Court, their Lordships are of opinion that the sum in question forms part of the assessable income of the respondents under section 25 of the Income Tax Assessment Act. It is thus unnecessary to consider the alternative argument of the Crown which was based on section 26 of the same Act.

Mr. Menzies did not seek to contend that, if the payment was assessable, it could be attributed to any year other than the year ending December 31, 1949.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed and each of the questions raised by the stated case should be answered in the affirmative. The respondents must pay the costs of the appellant here and in the High Court.

Solicitors: *Coward, Chance & Co.; Woodroffes.*

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COMMISSIONER OF STAMP DUTIES . . . RESPONDENT.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE FIJI COURT OF APPEAL AND THE SUPREME COURT
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Fiji—Revenue—Gift duty—Gift of current life insurance policy—Donor's intention to pay future premiums—Donee's interest unaffected by any contingency—Value at date of gift the value for purposes of duty—Death and Gift Duties Ordinance (Laws of Fiji, 1945, Rev., c. 151) (as amended by Ordinance No. 32 of 1948, s. 5), ss. 15, 45, 46, 51.

Fiji—Appeal to Court of Appeal—Competency—Decision of Commissioner of Stamp Duties not a decision of a court of justice—Supreme Court sitting “in first instance” to hear case stated—Judgment subject to appeal—Court of Appeal Ordinance (*Fiji*), No. 2 of 1949, s. 11.

Revenue (Fiji)—Gift duty. Insurance—Life assurance—Policy—Property in—Not contingent. Tribunal—Statutory—Whether court of justice “first instance.”

By section 51 of the Death and Gift Duties Ordinance of Fiji:
“(1) Within one month after the making of any gift the value
“of which is not less than £1,000 . . . the donor shall deliver
“to the commissioner a statement in the prescribed form . . . and
“containing all such particulars with respect to the gift . . . as are
“necessary to enable the commissioner to determine whether the
“same is . . . dutiable and to assess the duty thereon, if any, and
“the commissioner shall thereupon proceed to assess and recover
“the gift duty accordingly.”

The appellant assigned to his wife absolutely a policy of insurance on his life for £1,000, together with all accrued and future bonuses, it being his intention to continue paying the premiums to keep the policy alive. At the date of the gift the surrender value of the policy did not exceed £400. The appellant having refused to file a statement under section 51 of the Death and Gift Duties Ordinance, the respondent, the Commissioner of Stamp Duties, assessed the gift for gift duty under the Ordinance at £57 15s. 6d. as being 5 per cent. (the rate fixed by section 45) on "policy value plus accrued bonuses £1,155 12s." On a case stated pursuant to the provisions of section 59 of the Ordinance to the Supreme Court of Fiji, that court affirmed the assessment of the commissioner, holding that the true value for the purposes

* *Present*: LORD COHEN, SIR LIONEL LEACH and MR. L. M. D. DE SILVA.

of assessment to duty was not to be taken at the present value at the time of the gift, but that the interest of the donee was affected by a contingency—that the amount which the donee would recover would depend on whether the premiums were paid up during the rest of the donor's life or the policy was surrendered at some earlier date—and that the commissioner was bound to, and did, compute the value of the gift in accordance with the terms of section 46 (1) and section 15 of the Ordinance, which dealt with interests affected by a contingency.

On the appellant seeking to appeal from that decision to the Court of Appeal, that court held that they had no jurisdiction to entertain an appeal from a decision of a single judge of the Supreme Court under section 59 of the Ordinance since, in their view, the judge was not sitting "in first instance" within the meaning of section 11 of the Court of Appeal Ordinance, 1949, which provided that "an appeal shall lie in any cause or matter . . . to the Court of Appeal from a single judge of the Supreme Court of Fiji sitting in first instance . . . from all final orders, judgments and decisions. . . ."

On appeal by the appellant against both the judgment of the Supreme Court and the decision of the Court of Appeal:—

Held, first, that the value of the gift for the purposes of the Ordinance was the present value at the date of the gift. The interest of the donee was an absolute interest unaffected by any contingency, for the uncertainty as to the amount which the insurance company would ultimately have to pay could not produce the result that the interest of the donee in the subject-matter of the gift was affected by a contingency. The intimation by the appellant that he intended to keep the policy up by paying the future premiums was only a statement of intention to make further gifts in the future and could not amount to a gift; that statement of intention could not constitute a gift of the future premiums or import any contingency into the absolute gift. Accordingly, the value of the gift being below £1,000, the appellant was under no obligation to make a statement under section 51 of the Ordinance, and the respondent had no jurisdiction to make the assessment, and the gift was not liable to any gift duty.

Observations of Viscount Simon in *D'Avigdor-Goldsmid v. Inland Revenue Commissioners* [1953] A.C. 347, 361; [1953] 2 W.L.R. 372; [1953] 1 All E.R. 403 considered.

Held, secondly, that the Supreme Court when it answered the questions put to it in the case stated was sitting in first instance. In the present case the meaning of "sitting in first instance" had to be considered where those words appeared in a statute constituting a Court of Appeal; the words were plainly directed to limiting a litigant's right to appeal from one court of justice to another. It was not intended to deprive a litigant who had not been heard in any court of justice except the Supreme Court of a right to appeal to the Court of Appeal. While some of the provisions of the Death and Gift Duties Ordinance undoubtedly indicated that the commissioner had some of the powers which he might be expected to possess if he were exercising judicial functions, there

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were plainly absent certain provisions which were usually regarded as essential to the due administration of justice in a court of justice, and in the circumstances it could not be held that the decision of the commissioner on a question of law could be regarded as the decision of a court of justice. That being so, the decision of the Supreme Court on a question of law under section 59 of the Ordinance was accordingly the first judicial decision on the point, and was therefore subject to appeal to the Court of Appeal.

Nakkuda Ali v. M. F. de S. Jayaratne [1951] A.C. 66; 66 T.L.R. (Pt. 2) 214 considered.

If the commissioner's determination was to be regarded as the decision of a court of justice, he had been the judge in his own cause, and while, no doubt, an executive officer can be made a judge in his own cause, in the case of ambiguity in the statute the court must lean against a construction which would have that effect.

Lastly, section 66 of the Ordinance, which provides, *inter alia*, for a valuation by an official valuer in certain circumstances, has no application where the administrator or the donor has refused to furnish the statement required by section 51.

Judgments of the Supreme Court and the Court of Appeal reversed.

CONSOLIDATED APPEALS (No. 2 of 1953), the first being from a judgment of the Fiji Court of Appeal (August 22, 1952), and the second being an appeal by special leave from a judgment of the Supreme Court of Fiji (April 28, 1952).

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: This appeal raised a question as to the liability of the appellant under the Death and Gift Duties Ordinance (chapter 151 of the 1945 edition of the Laws of Fiji) to gift duty in respect of an absolute gift by the appellant to his wife made on March 14, 1951.

The Ordinance was divided into five parts dealing respectively with: (1) estate duty, (2) succession duty, (3) assessment and collection of estate and succession duty, (4) gift duty and (5) miscellaneous.

None of the provisions of Part I was relevant to any question to be decided on this appeal. Section 15 of Part II, which dealt with valuation of contingent interests for purposes of succession duty, was made applicable to the valuation of contingent interests of beneficiaries for the purposes of gift duty by section 46 of Part IV. Section 15 (1) provided as follows: "For the purposes " of succession duty every contingency affecting the succession " shall be deemed to have determined in the manner in which, in " the opinion of the commissioner, it probably will determine, and " the succession shall be valued and succession duty assessed and " paid accordingly."

Subsection (2) of the section gave a right of appeal to the Supreme Court by way of case stated from any decision of the commissioner under subsection (1) as if the decision was the determination of a question of law. It further provided that if no such appeal was commenced within 30 days, the decision of the commissioner was to be final and conclusive.

The only section in Part III to which it was necessary to refer was section 30, which imposed on every administrator the obligation within six months of the grant of administration of delivering to the commissioner a statement in writing in the prescribed form containing the prescribed particulars with respect to the interests of the several successors of the deceased.

Turning to Part IV; under section 34 a duty was imposed on every gift as defined by section 35. Section 35 defined gift as meaning any disposition of property (as defined by section 37) which was made otherwise than by will, whether with or without an instrument in writing, without fully adequate consideration in money or money's worth.

Section 37 defined "disposition of property" in very wide terms, including, amongst other things, "(b) creation of a trust."

Section 42, as amended, exempted from gift duty any gift the value of which together with the value of all other gifts made at the same time or within 12 months subsequently or previously did not exceed £1,000 in value. Section 45 fixed the rate of gift duty at 5 per cent.

Section 46, on which much of the argument in this appeal turned, was in the following terms: "(1) For the purpose of "computing the value of a gift the interests of beneficiaries, so "far as those interests are affected by any contingency, shall be "valued in the same manner as the contingent interests of "successors in the case of succession duty, and the provisions "of Part II of this Ordinance with respect to reassessment, "payment of deficient duty and refund of duty paid in excess "shall extend and apply accordingly to gift duty with all necessary modifications.

"(2) Subject to the provisions of this Part of this Ordinance "the value of a gift shall be deemed and taken to be the present "value thereof at the time of the making of the gift."

Section 51, as amended, provided in subsection (1) that within one month after the making of any gift the value of which was not less than £1,000, or the value of which added to the value of any other gifts made by the donor within 12 months previously amounted to not less than £1,000, the donor should deliver to

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the Commissioner a statement in the prescribed form, verified by statutory declaration in the prescribed form and manner, and containing all such particulars with respect to the gift or gifts as were necessary to enable the commissioner to determine whether the same was or were dutiable and to assess the duty thereon, if any, and that the commissioner should thereupon proceed to assess and recover gift duty accordingly. Subsection (3) provided that after the delivery of the aforesaid statement it should be the duty of the donor, and of every beneficiary or trustee of a beneficiary, to furnish the commissioner with such additional evidence as he reasonably required for the purposes of this Ordinance with respect to the gift.

Section 57 provided that if a donor made default in delivering within one month the statement required by section 51 to be so delivered, the commissioner might thereupon proceed to assess and recover the duty payable on the gift in the same manner as if the statement had been duly delivered.

Section 59 provided for an appeal to the Supreme Court of Fiji from the assessment of the commissioner. So far as material it was in the following terms: "59.—(1) Any administrator who "is dissatisfied in point of law with any assessment of death "duty made by the commissioner, and any donor who is dissatisfied in point of law with any assessment of gift duty so "made, may, within thirty days after notice of the assessment "has been given to him, deliver to the commissioner a notice in "writing requiring him to state a case for the opinion of the "Supreme Court.

"(2) The commissioner shall thereupon state and sign a case "accordingly setting forth the facts, the question of law to be "decided and the assessment made by him, and shall deliver the "case so signed to the administrator or donor (hereinafter referred "to as the appellant).

"(3) The appellant shall, within fourteen days after receiving "the case, transmit the same to the registrar of the Supreme "Court, and the registrar shall thereupon enter the case for "hearing at the next sitting of the court and shall give notice "thereof to the appellant and to the commissioner.

"(4) On the hearing of the case the Supreme Court shall "determine the question submitted, and the commissioner shall "thereupon assess the duty payable in accordance with that "determination.

"(5) The Supreme Court may, if it thinks fit, cause the case "to be sent back to the commissioner for amendment, and

“thereupon the case shall be amended accordingly and the court shall thereupon proceed to hear and determine the question so submitted.”

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Section 60 (1) empowered the commissioner to hold an inquiry for the purpose of obtaining information respecting any claim for duty under the Ordinance and to summon before him and examine on oath touching any matter which was relevant to any claim for duty all persons whom the commissioner or any other person interested required to be so called and examined. Subsection (2) of the section provided that on any such inquiry the commissioner should be deemed to be vested with all the powers which might be conferred on commissioners under the Special Commissioners Ordinance, chapter 99 of the Laws of Fiji, which enabled the Governor to delegate to all commissioners powers like to those vested in the Supreme Court (a) for compelling the attendance of witnesses and the production of documents; (b) for administering oaths or affirmations to witnesses and compelling them to give evidence; (c) for the punishment of contempt if committed in the presence of any commissioner when engaged in taking evidence in pursuance of the objects of the commission.

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Section 61 gave the commissioner a right to inspect books, records, registers, etc., in the custody or possession of public officers and other persons and bodies corporate.

Section 66 dealt with valuation for the purposes of duty under the Ordinance and, so far as material, was in the following terms: “66.—(1) For the purpose of assessing death duty or gift duty, if the commissioner is not satisfied as to the value as stated by the administrator or donor, as the case may be, of any portion of the dutiable estate of the deceased or any portion of the subject of a gift, he may determine it either by agreement between himself and the administrator in the case of death duty or between himself and the donor in the case of gift duty or, in the event of a failure to agree, by a valuation made by an official valuer appointed under the Stamp Duties Ordinance. . . . (3) Any administrator in the case of death duty, or any donor in the case of gift duty, or the commissioner in either case, may, within one month from the date upon which a valuation by an official valuer is communicated to him, appeal by way of originating summons against such valuation to the Supreme Court.”

Section 67 provided that subject to the provisions of section 66 the value of any property should, for the purpose of assessing any duty under the Ordinance, be ascertained by the commissioner in

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such manner as he thought fit. Section 68 enabled the commissioner to claim payment of further duty in any case where he considered too little had been paid. Section 69 provided that any duty under the Ordinance might be recovered on behalf of the Crown by action in his official name in any court of competent jurisdiction against any person liable to pay the same.

As regards the facts, the subject-matter of the gift was a policy of insurance on his own life for £1,000 which the appellant had taken out with the Australian Mutual Provident Society on July 19, 1939. The policy entitled the assured to participate in any surplus which might be distributed as reversionary additions to participating policies. On March 14, 1951, the appellant assigned to his wife absolutely the policy together with all bonuses already accrued and all future bonuses which might thereafter accrue thereon. On March 17 his solicitors forwarded the deed of gift to the commissioner in order that it might be stamped under the Stamp Duties Ordinance, stating that the present value of the insurance policy surrendered did not exceed the sum of about £400, and that, accordingly, the deed would not attract gift duty. If gift duty were payable no stamp duty would be payable on the deed of gift having regard to the provisions of section 52 of the Death and Gift Duties Ordinance.

The commissioner duly stamped the deed and returned it to the appellant's solicitors under cover of a letter dated April 3, 1951. In that letter he added that for the purpose of record he would be grateful if the appellant would complete the attached form (being the form prescribed pursuant to section 78 of the Death and Gift Duties Ordinance) and provide him with a certified copy of the deed of gift. The appellant's solicitors wrote to the commissioner on April 10, 1951, saying that the commissioner had misconstrued the provisions of section 51 of the Death and Gift Duties Ordinance since it was only when the value of a gift was not less than £1,000 that the declaration had to be made.

On May 4, 1951, the commissioner replied agreeing that unless the gift, with other gifts, exceeded £1,000, the donor was not obliged to deliver a statement in the prescribed form. He explained his reasons for asking for completion of the statement and concluded his letter with a request to be informed of the policy value, the amount of any bonus which had accrued at the date of the gift, and whether it was the appellant's intention to pay the premiums and keep up the policy. To that letter the appellant's solicitors replied on May 14 stating that they had not the exact figures available and referring the commissioner to the

Fiji agents of the insurance company for the details he required. They added that it was the appellant's intention to pay the premiums and keep up the policy. The commissioner applied to the agents in question and was informed by them that the surrender value of the policy was at that date £306 12s. Further correspondence ensued, but the appellant persisted in his refusal to file a statement under section 51 of the Death and Gift Duties Ordinance. Accordingly, on September 25 the commissioner gave notice that he had assessed the gift in question for gift duty at £57 15s. 6d. as being 5 per cent. on "policy value plus accrued " bonuses £1,155 12s. 0d."

The appellant was dissatisfied in point of law with that assessment, and on October 9, 1951, gave notice to the commissioner requiring him to state a case in accordance with section 59 of the Death and Gift Duties Ordinance. The commissioner complied with that request on January 25, 1952. In that case stated he set forth the facts which have been summarized above, and in paragraph 12 stated that he had made the assessment as in his opinion he was entitled to do by virtue of the provisions of sections 57 and 68 of the Death and Gift Duties Ordinance.

The questions of law to be decided by the Supreme Court were stated in paragraph 16 of the case, which read: "(A) Had the " respondent in the circumstances aforesaid any jurisdiction to " make the assessment of duty referred to in paragraph 12 hereof? " (B) If so, what was the value of the said gift, at the date on " which it was made, for the purposes of the Ordinance? (C) Is " the said gift, or the said deed, liable to gift duty at any, and " if so what amount?"

The matter came before Vaughan C.J., who gave judgment on April 28, 1952, answering the three questions as follows: (a) The respondent had jurisdiction to make the assessment of duty referred to in paragraph 12 of the case stated. (b) The value of the gift for the purposes of the Ordinance must be computed by the commissioner under subsection (1) of section 46. (c) The deed is liable to the duty assessed by the commissioner, namely, £57 15s. 6d.

The Chief Justice stated the issue to be decided by him in these terms, " whether the true value of the gift for the purposes of the " assessment of duty is to be taken as the present value at the " time of the gift, or whether the interest is contingent interest, " in which case the Ordinance requires the value of the gift to be " computed by the commissioner in the terms of subsection (1) " of section 46 and section 15." He came to the conclusion that

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the interest of the beneficiary was affected by a contingency, the contingency apparently being that the amount which the donee would receive in respect of the policy on the death of the donor would depend on whether the premiums were paid up during the rest of the life of the donor or the policy was surrendered at some earlier date.

The appellant, being dissatisfied with that decision, gave notice of appeal to the Court of Appeal on May 13, 1952. When the matter came before the Court of Appeal on August 18, 1952, the Solicitor-General, who appeared for the respondent, raised the question whether there was any right of appeal under section 11 of the Court of Appeal Ordinance, which provided that "an appeal shall lie in any cause or matter, not being a criminal proceeding, to the Court of Appeal from a single judge of the Supreme Court of Fiji sitting in first instance" inter alia in the following cases, namely, "(a) from all final orders, judgments and decisions. . . ."

He argued that the Chief Justice was not sitting in first instance, but was hearing an appeal from an assessment of the commissioner. The Court of Appeal (Carew Ag.C.J., Raby Hieatt and Russell JJ.) upheld his submission, ending their judgment by saying: "However desirable it may be that an appeal should lie to this court, we think that we are bound to hold, on the wording of the section quoted above [section 11], that no appeal lies to this court from a decision of a single judge of the Supreme Court under section 59 of the Death and Gift Duties Ordinance, chapter 151." Accordingly they held that the Appeal Court had no jurisdiction to entertain the appeal and ordered the appellant to pay the commissioner's costs.

On September 12, 1952, the Court of Appeal gave leave to the appellant to appeal to the Board from that order. In pursuance of that leave the appellant gave notice of appeal, but before that appeal could be heard he applied on April 21, 1953, to the Board for leave to appeal against the judgment of the Supreme Court. Leave was granted but without prejudice to the right of the commissioner to maintain that the case ought to be sent back to the Fiji Court of Appeal if that court had jurisdiction to hear it. It was also directed that the two appeals be consolidated and heard together.

1954. Jan. 18, 19. *Quass Q.C.* and *Biden Ashbrooke* for the appellant. The first question is whether there was a right of appeal from the decision of the Supreme Court to the Court of

Appeal in this case, and it turns on the meaning of the words "sitting in first instance" in section 11 of the Court of Appeal Ordinance, 1949. The Supreme Court was set up in Fiji in 1876 with, generally speaking, powers similar to those of the High Court of Justice in England. At that time in Fiji there were no inferior courts comparable with magistrates' courts. In 1945, by the Magistrates' Courts Ordinance, magistrates' courts were set up and a right of appeal was given from the magistrates' courts to the Supreme Court. In 1949 a Court of Appeal was constituted for Fiji, and it is submitted that, when in the Court of Appeal Ordinance provision was made for appeals to the Court of Appeal from the Supreme Court, what the legislature had in mind in stating that appeals would only lie in cases where the judge of the Supreme Court was sitting in first instance was to draw a distinction between (a) cases where the judge dealt with the matter at first instance, and (b) where he was sitting in appeal from a magistrate's court.

Before the appellant can be prevented from going on appeal to the Court of Appeal it must be shown that the Supreme Court was sitting on appeal from someone exercising judicial functions, and it is submitted that here it was not, for the commissioner was acting in an administrative capacity. A distinction is to be drawn between cases where on a case stated a judge is acting judicially as a court of first instance, and cases stated by inferior courts in this country. Under section 59 (4) of the Death and Gift Duties Ordinance the Supreme Court determines the matter as a court of first instance, and there is therefore a right of appeal from its decision. [Reference was made to *Commissioner of Stamp Duties of New South Wales v. Pearse*¹; *Jaganath v. Commissioner of Stamp Duties*,² and *Secretary of State for India v. Chelikani Rama Rao*.³] The mere fact that section 59 of the Ordinance uses the word "appellant" does not make this matter an appeal at all. The Court of Appeal were wrong in holding that the hearing before the Supreme Court was not a hearing at first instance; the Court of Appeal had jurisdiction to entertain the appeal.

With regard to the appeal to this Board from the decision of the Supreme Court on the case stated, there are two questions: (1) whether the commissioner had no power to make any assessment at all; (2) whether he and the courts following him adopted

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¹ [1954] A.C. 91.³ (1916) 85 L.J.P.C. 222.² Unreported, Civ.App. No. 4 of 1947 (Fiji).

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the right way to value the gift—a life insurance policy—in this case. It is submitted that the commissioner had no right to make an assessment at all; that he did not follow the right road in that connexion; and that the basis on which he valued the insurance policy was quite wrong. There is no question that the surrender value of the policy at the date of the gift in 1951 was less than £400, including the declared bonuses. The commissioner valued the policy at its full value, that is, £1,000, which would be paid when the appellant died, plus bonuses which would have accrued at that time. In other words, he treated it as though the appellant was dead instead of alive. There are no words in the Ordinance to justify that method of valuation. The all-important section of the Death and Gift Duties Ordinance in this case is section 46 (1), under which the Chief Justice held, wrongly, it is submitted, that there was liability. The judge thought that section 46 (2) was an alternative method to that set out in section 46 (1). It is submitted that that again is wrong, and that it is quite plain that section 46 (2) sets out the method applicable in this case—the present value of the gift at the time it was given. There is nothing whatever to stop that method being adopted in regard to what are called contingent interests. Even if the gift is given contingently, still what has to be looked at is the present value. The present value of a vested interest must be higher than the present value of a contingent interest. One is not, however, dealing with a contingent interest here at all. The conclusion of the Chief Justice is so startling that it would certainly require very clear words in the statute before that result could be justified.

The Chief Justice was also wrong in holding that the commissioner was not bound in law to determine the value of the gift by obtaining a valuation made by an official valuer pursuant to section 66 of the Ordinance. The commissioner must go to section 66. Here the commissioner had no jurisdiction to make an assessment at all because the value of the gift was less than £1,000.

J. G. Le Quesne for the respondent. The question as to the jurisdiction of the Court of Appeal must be approached strictly on the words of section 11 of the Court of Appeal Ordinance. To lawyers the word “appeal” has certain immediate connotations—the hearing before one judicial tribunal and reconsideration of the finding by a second tribunal. Section 11 does not refer to cases where a single judge sits in an appellate jurisdiction at all, but only to cases where he is sitting in the first instance. Here,

this matter did not come before the Chief Justice in first instance because before coming before him it had already been before another officer—the commissioner—who had the duty to decide this question. The important thing to note is that one is not asked to decide under section 11 whether what came before the Chief Justice was or was not an appeal, but simply whether he was sitting in first instance. It is not necessary to decide whether the commissioner was acting in a judicial capacity; he makes an assessment and that is a direction which in some circumstances can be enforced. No inference can usefully be drawn from the use of the word “sitting” in this Ordinance, because it is the word which normally would be used.

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This is a matter on which there are many English decisions, which have arisen chiefly in litigation concerned with whether the prerogative writs will or will not lie to particular bodies. The latest consideration of the question was in a case before this Board from Ceylon, *Nakkuda Ali v. M. F. de S. Jayaratne*,⁴ which gives as much guidance as can be obtained from going through a number of other cases on the subject. If it is found that there is no determination on a question, and no inquiry, there is no judicial act. Here, the commissioner was determining a question after inquiry, which the Controller of Textiles in *Nakkuda Ali's* case⁴ was held not to be doing. The commissioner is bound to hold whatever inquiry is necessary, and in making his determination he is performing a judicial act. If, in order for the Supreme Court not to be sitting in first instance, it is necessary that there should have been an earlier judicial act, that procedure is satisfied under section 59 of the Death and Gift Duties Ordinance. The propositions on this point may be formulated as follows: a judge is not sitting in first instance (a) if as to any part of the case he is bound by the conclusion previously reached by somebody else; (b) if the procedure under which the case comes before him requires its prior judicial consideration by somebody else with power to reach a decision which at the moment at which it is given is binding on the parties. Accordingly, the Chief Justice was not “sitting in first instance,” and no appeal lay from his decision to the Court of Appeal.

Turning to the appeal from the Supreme Court, it was said for the appellant that whether this interest was or was not affected by a contingency, what the commissioner did was wrong because he ought to have referred the matter to a valuer under section 66.

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It is submitted that the commissioner's procedure was perfectly right and that he was under no obligation to employ the procedure of section 66. "Stated" in section 66 must be interpreted to mean stated as required by section 51. If, however, it means stated in any way, and not necessarily as required by section 51, still the operation of section 66 is limited to cases where there is a dispute simply about value. The commissioner is only obliged to refer it to a valuer if he is not satisfied with the value as stated by the administrator or donor. In this case the dispute was not simply about figures, but about the interpretation of the Ordinance.

On the merits, the Chief Justice was correct in the way in which he put the question: "The question, however, in terms of the Ordinance is not whether the gift of the policy was subject to a contingency but whether the interest of the donee as a result of the gift is affected by any contingency; if it is, the value of the gift for the purposes of the Ordinance is not the present value at the time of the gift but the value as computed by the commissioner, as provided by section 46 (1) and section 15." The donee's interest in the gift was affected by a contingency. An out and out gift of a contingent interest does not come within section 46. By a gift of a policy of insurance is meant a gift—an assignment of a chose in action—of a contractual right against the insurance company. What exactly was given in this case was correctly stated by the Chief Justice: "In the event of the policy being kept up by the payment of the premiums . . . the value of the interest acquired by the donee would prove to be the full value of the policy payable on the death of the donor; on the other hand, it is open to the donee to surrender the policy at any time during its currency, and in the event of her doing so the interest acquired under the policy would be the surrender value of the policy at the time." What the gift amounted to was an expectation of one day receiving free, without the donee ever having to pay anything herself, the sum of £1,000, and bonuses. The decision of the Supreme Court was right.

Quass Q.C. in reply. "Stated" in section 66 of the Ordinance cannot mean stated under section 51, or cannot be limited to that.

If the judge was not sitting at first instance it involves that somebody else was. "Sitting" does involve somebody acting in a judicial or semi-judicial capacity. Looking at the Ordinance as a whole, the commissioner is not sitting in a judicial or quasi-judicial capacity; for him to do so there must be an inquiry at

which the taxpayer can be heard. It would also be rather remarkable to find an official acting as a judge or quasi-judge in his own cause. And if the commissioner is sitting in a judicial or quasi-judicial capacity it is a little strange to find that he also has a right of going to the court.

The judge was sitting at first instance on the only matter which came before him, namely, the points of law raised in the special case. When the Supreme Court was set up it had no appellate functions at all. The Magistrates' Courts Ordinance of 1945 first gave appellate functions to the Supreme Court, and bearing that in mind, when one comes to consider the Court of Appeal Ordinance and the words "sitting in first instance," it means when it is sitting under the Supreme Court Ordinance rather than on appeal under the Magistrates' Courts Ordinance. [Reference was made to *D'Avigdor-Goldsmid v. Inland Revenue Commissioners* ⁵ and *Fisher v. Keane*.⁶]

Feb. 23. The judgment of their Lordships was delivered by LORD COHEN, who stated the facts set out above, and observed that in view of the wide definition of "disposition of property" in section 37 of the Death and Gift Duties Ordinance it was clearly possible that the interest of a donee under a gift within the meaning of the Ordinance might be made contingent. In his judgment, the Chief Justice pointed out that there was no dispute between the parties either as to the surrender value at the time of the gift, or as to the amount which would become due on the fully paid up policy on the death of the donor, meaning thereby, as their Lordships thought, as to the amount which would have been due under the policy on the assumption that the appellant had died immediately after making the gift. His Lordship continued: When the matter came before their Lordships on January 18, 1954, Mr. Le Quesne, for the commissioner, did not ask that the case should be sent back to the Fiji Court of Appeal and was content that their Lordships should deal with the matter on its merits. Accordingly their Lordships will proceed to deal first with the appeal from the judgment of the Supreme Court of Fiji dated April 28, 1952.

The foundation of the judgment of the Chief Justice is that the relevant provisions of the Death and Gift Duties Ordinance under which the matter falls to be decided are sections 46 and 15. These sections only become relevant if the interests of beneficiaries

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⁵ [1953] A.C. 347, 361; [1953] 2 W.L.R. 372; [1953] 1 All E.R. 403.

⁶ (1878) 11 Ch.D. 353.

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are affected by a contingency. In the present case their Lordships are satisfied that the interest of the donee is an absolute interest unaffected by any contingency. The amount which the donee will ultimately receive as the result of the gift will no doubt depend, as the Chief Justice pointed out, on whether the donee surrenders the policy or the premiums continue to be paid until the death of the donor. But in their Lordships' opinion this uncertainty as to the amount which the insurance company will ultimately have to pay cannot produce the result that the interest of the donee in the subject-matter of the gift is affected by a contingency. Their Lordships derive support for this opinion from the observations of Viscount Simon in *D'Avigdor-Goldsmid v. Inland Revenue Commissioners*.¹ In that case their Lordships had to consider the rights of an assignee of a life policy and his Lordship said ²: "A life policy is a piece of property which confers upon the owner of it the right, if certain conditions continue to be satisfied, to claim and be paid the policy moneys on the death of the person whose life is assured. These rights therefore belonged to the appellant from 1934" (the year of the assignment) "and were the beneficial interest in the policy which belonged to him from that moment. When the death occurred, he held these rights, and the quality of these rights was not changed by the death, which was merely the occasion when the rights were realized."

The Chief Justice appears to have been influenced by the fact that in the course of the correspondence the donor intimated his intention to keep up the policy by paying the future premiums thereon. But this is only a statement of intention to make further gifts in the future. It cannot amount to a gift. The donee would be unable to compel the donor to fulfil that intention, and their Lordships are unable to see how this statement of intention can constitute a gift of the future premiums or import any contingency into the absolute gift.

Their Lordships think that the value of the gift for the purpose of the Ordinance is the present value. It necessarily follows that the value of the gift was below £1,000, that the appellant was under no obligation to make a statement under section 51, and that accordingly the respondent had no jurisdiction to make an assessment under either section 57 or section 68 of the Death and Gift Duties Ordinance. Accordingly, the answers to the questions submitted in the case stated should have been: (a) That the

¹ [1953] A.C. 347; [1953] 2 W.L.R. 372; [1953] 1 All E.R. 403.

² [1953] A.C. 361.

respondent had no jurisdiction to make the assessment under either section 57 or section 68; (b) does not arise; (c) the gift was not liable to any gift duty.

Turning now to the appeal from the decision of the Court of Appeal, it may be said that the question as to the jurisdiction of the Court of Appeal has become academic in view of their Lordships' opinion on the merits. But the matter was fully argued and raises a question of general importance. Moreover, their Lordships must, in any event, deal with the costs of the proceedings in the Court of Appeal. For these reasons their Lordships think it right to express their opinion on the difficult question raised by the decision of the Court of Appeal. That question is whether or not the Chief Justice was sitting in first instance when on April 28, 1952, he answered the questions put to him in the stated case.

Mr. Le Quesne, for the commissioner, submitted that the answer to that question must be in the negative, and summed up his argument in the following two propositions: "A judge is not sitting in first instance if (1) as to any part of the case he is bound by conclusions previously reached by someone else; or (2), the procedure under which the case comes before him requires its prior consideration by someone else with power to reach a decision which at the moment at which it is given is binding on the parties, at least if that consideration has to be a judicial consideration."

On the first part of this argument he referred us to the terms of section 59 which, he said, as their Lordships think correctly, led to the conclusion that the appellant taxpayer is bound by the findings of fact in the case stated unless, of course, he is able to submit that there was no evidence to support the finding or the case is sent back to the commissioner for amendment under subsection (5) of section 59. Their Lordships are, however, unable to accept this branch of Mr. Le Quesne's argument as conclusive in his favour since the only question before the Chief Justice was a question of law, and if no other person or body had previously decided that question of law in a judicial capacity, their Lordships see no reason for concluding that the Chief Justice was not sitting in first instance so far as that question was concerned. It is, of course, true that the commissioner had to make up his mind on the question of law, for unless he answered the question in his own favour he had no power to make an assessment. The real question for their Lordships' decision is whether in deciding it in his own favour he was acting in a judicial capacity.

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Counsel were unable to refer to any authority directly in point, but Mr. Le Quesne called attention to the decision of this Board in *Nakkuda Ali v. M. F. de S. Jayaratne*,³ where their Lordships had to consider the powers of the Supreme Court of Ceylon under section 42 of the Courts Ordinance (R.S. of Ceylon, 1938, c. 6) to grant and issue according to law a mandate in the nature of certiorari against the Controller of Textiles in Ceylon reversing his decision to cancel a licence granted by the controller. Under that section a mandate could only be issued to "any District Judge, Commissioner, Magistrate or other person or tribunal," and the respondent submitted that the words "or other person" or "tribunal" in that context must be construed in accordance with the ejusdem generis rule and were confined to tribunals (or persons acting as tribunals) which were in the ordinary sense judicial bodies. Their Lordships agreed with the Supreme Court of Ceylon in rejecting that argument and held that regard must be had to the relevant rules of the English common law in order to ascertain in what circumstances and under what conditions the court could be moved for the issue of a prerogative writ.

Delivering the judgment of the Board, Lord Radcliffe said⁴ that the principle governing the jurisdiction of the courts by way of certiorari was most precisely stated by Atkin L.J. in *Rex v. Electricity Commissioners*⁵ as follows: "... the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, courts of justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

He also cited a short passage from the judgment of Lord Hewart C.J. in *Rex v. Legislative Committee of the Church Assembly*,⁶ where he said: "In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be superadded to that characteristic the further characteristic that the body has the duty to act judicially." Lord Radcliffe went on to point out that that characteristic was lacking in the matter then before the Board. In reaching that

³ [1951] A.C. 66; 66 T.L.R. (Pt. 2) 214.

⁴ [1951] A.C. 78.

⁵ [1924] 1 K.B. 171, 205; 39 T.L.R. 715.

⁶ [1928] 1 K.B. 411, 415; 44 T.L.R. 68.

conclusion he stressed the facts that (a) the Controller of Textiles was taking executive action, not determining a question, and (b) the regulation contained no procedure to secure that the licence holder should receive notice of the intention to revoke the licence and no provision securing that there must be an inquiry public or private before the controller acted.

Mr. Le Quesne said that in the present case (a) the commissioner clearly had to determine the question of law before he could make an assessment, and (b) there could be no doubt that the taxpayer would receive notice of the commissioner's intention to make an assessment since the duty was on the taxpayer to deliver the statement under section 51. Their Lordships have some doubt as to the correctness of this assertion since (a) the determination may be part of the administrative act, not a judicial determination, and (b) if the commissioner is proceeding under section 57, theoretically at any rate the first indication which the taxpayer may have of the intention of the commissioner to make an assessment is when he receives a demand for the duty. Be that as it may, their Lordships are unable to derive much assistance from the decision of this Board in the case cited. In certiorari cases it is clear that the power of the court to issue the prerogative writ is not confined to cases where the order to which objection is taken was made by a court of justice in the sense in which that expression is ordinarily understood.

In the present case their Lordships have to consider the meaning of the words "sitting in first instance" where they appear in a statute constituting a Court of Appeal. These words are, their Lordships think, plainly directed to limiting a litigant's right to appeal from one court of justice to another. Thus, if a case originated in a magistrate's court and there was an appeal to the Supreme Court pursuant to section 35 of the Magistrates' Courts Ordinance, section 11 of the Court of Appeal Ordinance would have the effect that there could not be a further appeal to the Appeal Court. It was not intended to deprive a litigant who had not been heard in any court of justice except the Supreme Court of a right to appeal to the Court of Appeal. Can the decision of the commissioner properly be described as that of a court of justice? Certain provisions of the Death and Gift Duties Ordinance suggest that in certain cases it should be so regarded. Thus in section 15 (2) it is provided that the commissioner's decision under section 15 (1) shall be regarded as a determination of a question of law and that all the provisions of the Act thereafter contained (semble, meaning thereby section 59) should apply

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accordingly. Other provisions of the Ordinance, e.g., sections 60 and 61, contain provisions for inquiry and securing to the commissioner access to relevant documents. Mr. Le Quesne relied particularly on section 60 (2) importing the provisions of the Special Commissioner's Ordinance, to which their Lordships have already referred. Moreover, section 59 seems to imply that the commissioner's findings of fact will be binding on the taxpayer if there was any evidence to support them.

All these provisions undoubtedly indicate that the commissioner has some of the powers which he might be expected to possess if he were exercising judicial functions. On the other hand, there are plainly absent certain provisions which are usually regarded as essential to the due administration of justice in a court of justice. Thus, there is no provision indicating any right of the taxpayer to present to the commissioner either orally or in writing any argument on any question of law. Indeed, the commissioner may reach his decision on the question of law on evidence obtained by him under section 60 or section 61 of which the taxpayer knows nothing. It must also be borne in mind that if the commissioner's determination is to be regarded as the decision of a court of justice, this means that he has been the judge in his own cause. An executive officer can no doubt be made a judge in his own cause, but if there is an ambiguity in the statute their Lordships must lean against a construction which would have this effect. In these circumstances it seems to their Lordships impossible to hold that the decision of the commissioner on a question of law can be regarded as the decision of a court of justice. If it is not, it necessarily follows that the decision of the Supreme Court on a question of law under section 59 of the Ordinance is the first judicial decision on the point and is therefore subject to appeal to the Court of Appeal.

There is one other matter to which their Lordships should refer. Mr. Quass, for the appellant, argued that the dispute between the parties was a dispute as to value, and that accordingly this dispute could only be resolved by a reference to a valuer under section 66 of the Death and Gift Duties Ordinance. Their Lordships are unable to accede to this submission. In the first place, as the Chief Justice pointed out, the real dispute is not as to value at all. Secondly, section 66 only becomes applicable if the commissioner is not satisfied as to the value *as stated* by the administrator or donor. Reading the Ordinance as a whole, their Lordships think that "stated" must mean stated in the manner required by the Act, i.e., in accordance with section 30 in the case

of an administrator or section 51 in the case of a donor. Accordingly, section 66 can have no application where the administrator or donor has refused to furnish the statement required by section 51.

For these reasons their Lordships will humbly advise Her Majesty that both appeals should be allowed and that it be declared that the respondent had no jurisdiction to make the assessment of duty referred to in paragraph 12 of the case stated, and that the gift therein mentioned was not liable to any gift duty. The respondent must pay the costs of the appellant in the courts in Fiji and before this Board.

Solicitors: *Barrow, Rogers & Nevill; Burchells.*

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NKAU MAJARA APPELLANT;
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1954
Jan. 14;
Mar. 23.

ON APPEAL FROM THE HIGH COURT OF BASUTOLAND.

Basutoland—Criminal law—Accessory after the fact—Murder—Ritual murder—Headman—Requirements of Roman-Dutch law—" Association " with principal offence—Impassive conduct which assists principal offender to escape—Native Administration Proclamation (Laws of Basutoland, 1949, c. 54), ss. 6 (3), 14.

Criminal Law. Statutory penal provision—Whether limiting penalty for graver offence. Roman-Dutch law.

The term "accessory after the fact" as used in criminal law does not, under the law of South Africa—the Roman-Dutch common law—bear a meaning identical with that which it has under the English law. To constitute a person an accessory after the fact in South Africa it is sufficient to establish that assistance was given to the principal offender in circumstances from which it would appear that the giver "associated" himself with, in the broad sense of that word, the offence committed, and Roman-Dutch law makes no distinction for this purpose between giving assistance by remaining inactive and refraining from doing something, and giving assistance by doing something. The kind of impassivity, when it occurs after the commission of an offence by another, which has for its objective

* *Present*: LORD GODDARD C.J., LORD REID, and MR. L. M. D. DE SILVA.

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the giving of assistance to that other to escape, is under the law of South Africa punishable as the offence of being an accessory after the fact.

Where, therefore, the appellant, a gazetted native headman in Basutoland, had, contrary to his duty as such headman under section 6 (3) of the Native Administration Proclamation (Laws of Basutoland, 1949, c. 54), refrained from arresting the murderers on his arrival at the scene of a ritual murder, and thereby and by his subsequent conduct in failing to report the murder and to give prompt assistance to the police had assisted the murderers by giving them an opportunity to escape from justice, he had associated himself with the murder and was under the law of Basutoland, which for this purpose was the same as that of South Africa, an accessory after the fact to the murder.

Rex v. Mlooi [1925] S.A.L.R. (A.D.) 131 and Huber's Heedensdaegse Rechtsgeleertheit, Bk. VI, ch. 1, ss. 10 and 11 considered.

Further, the provision in section 14 of the Native Administration Proclamation, c. 54, which provided, inter alia, that a headman was liable to a fine if he wilfully neglected a duty imposed by the Proclamation, did not stand in the way of the conviction of the appellant, for the wilful neglect of the duty under the statute could occur without the objective of giving an offender an opportunity to escape, but where that latter element was present the graver offence of being an accessory after the fact had been committed.

Judgment of the High Court of Basutoland affirmed.

APPEAL (No. 29 of 1953), by special leave, from a judgment of the High Court of Basutoland (February 9, 1953) whereby the appellant, a headman, was convicted of being an accessory after the fact to the murder of one Motetwa Memani and was sentenced to 12 years' hard labour.

The appellant and 20 others were tried together by the High Court (Willan C.J. sitting with assessors) on an indictment charging them with the murder. The case for the prosecution was that all the accused were members of a gang which on May 16, 1952, seized Motetwa Memani, took him into a hut, inflicted various injuries on him by a ritual process thereby killing him, and then threw his body over a cliff. Of the 20 other persons nine were acquitted and 11 were convicted of murder. The appellant was convicted of having been an accessory after the fact to the murder.

The trial judge, giving the appellant the benefit of a doubt, found that "he was present immediately after the killing of the "deceased and not before it." He then proceeded to convict the appellant of having been an accessory after the fact upon the following findings: "First, that he is a gazetted headman of the "area in which this murder took place. Secondly, that he was in

“ a dominant position because he was a headman. Thirdly, that
 “ by virtue of section 6 (3) of the Native Administration Pro-
 “ clamation (cap. 54) there was a legal duty cast upon him to
 “ arrest any native he knew, or had information against, that
 “ such native had committed an offence for which an arrest
 “ could be made without a warrant. In this case accused No. 7
 “ knew that murder had been committed in the hut by certain
 “ persons known to him. Fourthly, that he took no effective
 “ action afterwards when the body had been thrown over the
 “ cliff. In his own evidence he said he knew of the existence of
 “ this body at the foot of the cliff on Saturday, May 17, 1952,
 “ but he did nothing about it till the following Tuesday. Fifthly,
 “ as a headman he did not carry out the provisions of two
 “ circular instructions, Exhibits E and F, issued by the Para-
 “ mount Chief of Basutoland regarding the immediate reporting
 “ of a ritual murder and the giving of prompt assistance to the
 “ police.”

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1954. January 14. *S. N. Bernstein* for the appellant. The granting of the special leave to appeal was subject to the condition that the appellant accepts the five findings of fact made by Willan C.J., and the sole question in this appeal is accordingly whether, accepting those findings, the appellant was rightly in law convicted of being an accessory after the fact to the murder. It is proper to emphasize that the Chief Justice nowhere found that the appellant was concerned in, or connected, at any time, with the actual commission of the murder, and he convicted him upon, and only upon, the findings of fact, his conclusion in law thereon being that “ the cumulative effect of all these matters leads me to one conclusion only, and that is that the appellant did all he could to defeat the ends of justice by hindering the apprehension of the murderers and by concealing the crime.”

The power to convict a person of being an accessory after the fact in respect of an offence in Basutoland is given by section 177 (2) of the Criminal Procedure and Evidence Proclamation, Laws of Basutoland, 1949 Rev., c. 16, which provides that “ any person charged with an offence may be found guilty as an accessory after the fact in respect of that offence, if such be the facts proved . . .” By virtue of section 2 of the General Law Proclamation, Laws of Basutoland, 1949 Rev., c. 26, the law to be administered in Basutoland is the same as that of South Africa for present purposes, and the determination of the question

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in issue depends therefore on the Roman-Dutch common law. The original Roman-Dutch law made no distinction between principals and accessories at all. The law in South Africa in regard to an accessory was in some doubt, and it is submitted that the final word about accessories has not been said, but there is no difference between English law and South African law on this matter. It requires some positive act in relation to the offence committed. The whole position is stated in Criminal Law in South Africa, by William Pittman, 3rd ed., pp. 80, 81. All Willan C.J.'s findings cannot be construed into the commission of the offence. Mere inactivity, passivity or inaction, which is what at the most the findings of fact amount to, is not such conduct as could render any person liable as being an accessory after the fact. It is abundantly clear that inasmuch as the appellant did no such act as could come within the description, according to law, of being an accessory after the fact to the murder, he was not guilty and could not, and should not, in law have been convicted.

J. G. Le Quesne for the Crown. English law on this matter is a very uncertain guide to this case. It is the Roman-Dutch common law and not the English common law which has to be applied here, and it is submitted that under Roman-Dutch law the offence is made out. Although the term "accessory after the fact" was unknown in Roman-Dutch law, it is submitted that the offence was not. Gardiner and Lansdowne, in South African Criminal Law and Procedure, 5th ed., vol. 1, p. 116, state that "reticence" may render a man an accessory after the fact in Roman-Dutch law. English law on this matter is to be regarded in association with what was the law as regards misprision of a felony: Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 1512. In *Rex v. Mlooi*¹ it was said: "He who intervenes to assist a criminal after the event may conveniently be called an accessory after the fact—not in the technical and restricted sense in which that term is used in the English law, but in an extended sense applicable to crimes in general." Particular attention is also directed to the words: "Those who assist in a crime fall under one or other of three classes,—they who actively help, they who knowingly supply the means though not present at the perpetration, and they who after the event harbour or conceal, or aid the flight of the criminal." Where a man in the position of the appellant here acted as he

¹ [1925] S.A.L.R.(A.D.) 131, 135.

did, he was concealing the crime which he knew to have been committed, and he thereby was guilty of being an accessory after the fact. The case is put on this distinction; between a man who does nothing because there is no duty cast upon him, and the man who does nothing by deliberately refraining from performing a duty which is cast upon him. [Reference was also made to *Rex v. Jongani*² and *Rex v. Van Rensburg*.³]

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The appellant came upon the murderers red-handed and proceeded to do nothing, and it is a natural use of language to say that by his reticence he was in those circumstances assisting the criminals by concealing the crime, and by so neglecting his own lawful duty he was making common cause with them. As headman, he was responsible for reporting all crime in his area, and having that duty cast upon him, his omissions may be of assistance in concealing the crime just as much as positive acts. "I kept silent because I wanted to keep out of it," may be a defence to a private person, but not in the case of this appellant; this is, if it may be so put, a penalty of office. The mere fact that he fails to perform his duty is itself evidence of what his intention was—the intention to help the criminals: the inference in the circumstances is that he wanted to do so. This is a matter in respect of which the law in South Africa and Basutoland goes beyond the English law. "Reticence" within the passage in Gardiner and Lansdowne, p. 116, may constitute a man an accessory after the fact in South Africa, which in England it cannot.

Bernstein in reply. Nothing in Roman-Dutch law will suffice to render a person guilty of the offence of being an accessory after the fact except some positive act which identifies him with the crime in some way. Apart from the duty which is put upon the appellant, he is in just the same position as any other citizen in the country. [Reference was made to *Rex v. Von Elling*.⁴] The law on this matter may be in some doubt in South Africa, but none of the authorities or textbook writers suggests that anything short of a positive act would be sufficient to establish the offence. The position is not intended to be any different in South Africa from what it is in England.

Jan. 14. LORD GODDARD C.J. announced that their Lordships would humbly advise Her Majesty that the appeal should be dismissed, and that they would give their reasons later.

² [1937] S.A.L.R.(A.D.) 400, 404.

⁴ [1945] S.A.L.R.(A.D.) 234, 237.

³ [1943] Tr.P.D. 436, 441.

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Mar. 23. The reasons of their Lordships for dismissing the appeal were delivered by Mr. L. M. D. DE SILVA, who stated the facts set out above and continued:

Murder is an offence for which an arrest could be made without a warrant. It is not disputed that the view of the law taken by the trial judge in the third finding is correct. It is abundantly clear from the judgment, although it is not expressly stated, that the appellant failed to arrest the murderers when he came into the hut immediately after the murder or at any time thereafter.

Special leave to appeal was granted to the appellant on condition that he was to be precluded from disputing the findings of fact above mentioned. The sole question for determination by their Lordships is whether, accepting the said findings of fact, the appellant was rightly convicted of having been an accessory after the fact to the murder.

Under section 2 of the General Law Proclamation (cap. 26, Laws of Basutoland) the common law of Basutoland "shall, as "nearly as the circumstances of the country will permit, be the "same as the law for the time being in force in the Colony or "the Cape of Good Hope."

The statute law consists of Acts passed by the Parliament of the Cape of Good Hope before May 29, 1884, and Proclamations made by the High Commissioner since that date.

It is not disputed that the determination of the question before their Lordships depends on the Roman-Dutch common law, which is the common law of the Cape of Good Hope and is also the common law in force in South Africa.

The view that the appellant was an accessory after the fact is founded on the fact that by refraining from performing his duties he gave the murderers assistance which in the ordinary course would, or might, have helped them to avoid being brought to justice. It has not been established that he gave assistance through any physical act.

It was conceded by counsel for the respondent that under the English law the appellant could not be held guilty of being an accessory after the fact. It was suggested that under that law a necessary element of the offence of being an accessory after the fact was assistance to the principal offender by a physical act and not merely by omitting to do something. Counsel for the respondent argued that the English law made this distinction because assistance by omission, which under any system of law could but be logically regarded as reprehensible equally with

assistance by commission, would in appropriate circumstances under the English law constitute the offence of misprision of felony. He contended that the position was wholly different under the law of South Africa because, among other reasons, under the Roman-Dutch law there prevailing, an offence arising from assistance by omission could not be accorded a separate category.

It was argued for the appellant that the term "accessory after the fact" had to be given a meaning under the law of South Africa in no way different from that which it possesses under the English law.

It is correctly stated by Gardiner and Lansdowne in their treatise on South African Law and Procedure (p. 116) that "the term 'accessory after the fact' is one derived from English law and although quite unknown to Roman-Dutch law criminologists, has been adopted in South African practice." In support of this view it is sufficient to refer to *Rex v. Mlooi*,¹ in which Solomon J.A., referring to a set of circumstances, which, on the authority of Moorman and Van der Linden, he thought constituted an offence under the Roman-Dutch law, said²: "It does not appear that under the Roman-Dutch law any special name was given to this offence, and it is therefore convenient to adopt the English law expression of 'accessory after the fact.' Its use is sanctioned not only by practice in our courts, but also by the fact that it is to be found enshrined in our statute law."

It does not necessarily follow from the fact that the term "accessory after the fact" has been adopted from the English law that it has the same meaning in the law of South Africa as it has under the English law. No doubt it would retain much of the connotation which it possessed under the English law, but its meaning in the country of its adoption could naturally and properly be influenced by the system of law prevailing in that country, namely, the Roman-Dutch law. This was almost inevitable, as the term had to be used in relation to, and in the course of administration of, that law. It is to be observed that Solomon J.A. in the passage quoted above was referring to an offence conceived under the principles of the Roman-Dutch law and fashioned by the notions current in that law. In their Lordships' opinion an authoritative view of the true position is to be found in the following passage in the judgment of Innes C.J. in *Rex v. Mlooi*³: "He who intervenes to assist a criminal

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¹ [1925] S.A.L.R.(A.D.) 131.² Ibid. 135.³ Ibid. 143.

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 1954 " the fact—not in the technical and restricted sense in which
 ——— MAJARA " that term is used in the English law, but in an extended sense
 v. " applicable to crimes in general. So used, its meaning is well
 THE QUEEN. " understood, and has received some degree of statutory recog-
 ——— " nition (Act 48 of 1882 (c) s. 61; Act 24 of 1886 (c) s. 81; Act 32
 " of 1916 s. 149 (2) and (c))."

The statute law affords no assistance in the determination of the question before their Lordships because no South African Act or Basutoland Proclamation defines the term " accessory after the fact " for the purposes of the general criminal law, although it occurs sometimes defined, sometimes undefined, in various statutes dealing with special subjects.

It appears to their Lordships, from what has already been said, that the term " accessory after the fact " does not, under the law of South Africa, bear a meaning identical with that which it has under the English law.

No decision of the South African courts was cited to their Lordships in which the question had been considered whether assistance to a principal offender given by omission is sufficient equally with assistance given by commission to render the giver an accessory after the fact. Nor have they been referred to the dicta of any of the Roman-Dutch jurists bearing on the point. The dicta quoted in the judgments in *Rex v. Mlooi*⁴ throw considerable light upon the elements which are necessary to constitute a person an accessory after the fact in South Africa. Those dicta and those judgments lead to this conclusion. To constitute a person an accessory after the fact in South Africa it is sufficient to establish that assistance was given to the principal offender in circumstances from which it would appear that the giver " associated " himself with, in the broad sense of that word, the offence committed. The dicta and the judgments do not concern themselves with the question whether assistance given by remaining inactive and refraining from doing something would render a person an offender equally with assistance given by doing something. In the absence of anything to the contrary in the Roman-Dutch law their Lordships would conclude that that law makes no distinction between the two ways of giving assistance. There is, however, not merely the absence of anything to the contrary, but something which supports that conclusion.

It appears to their Lordships that the idea that a person was

⁴ [1925] S.A.L.R.(A.D.) 131.

punishable, in appropriate circumstances, for refraining from action was prevalent in the Roman-Dutch law. For instance, Huber, in chapter 1, book VI, of his *Heedensdaegse Rechtsgeleertheyt* (translated by Percival Gane), dealing generally with crimes, says at section 10, "at times even refraining from action" "and mere impassivity makes a person liable to the ordinary "penalty." Huber goes on to say that this principle has been put into practice in cases of treason. He then says, "in other "very serious matters impassivity is also punished but with a "penalty less than the ordinary." In section 11, immediately following, he says: "Otherwise, apart from such dangerous and "detrimental impassivity and negligence of a man's duty, it is "an essential of crimes that there should be an act, the intention "of a person to do wrong not being enough to convict him of the "crime which he intends to commit, if he does not actually "commit it."

This passage appears to their Lordships to need some comment. It will be seen that here Huber deals with two kinds of "impassivity." In the one a person remains passive because, although he has formed an intention to accomplish something prohibited, he does nothing and thereby he fails to accomplish it. In these circumstances he commits no offence. In the other, by remaining passive and doing nothing a person accomplishes something prohibited, for instance, by refraining from arresting an offender he accomplishes something prohibited, namely, giving an offender assistance to escape. It is the latter form of "impassivity" which Huber styles "dangerous and detrimental" and which, according to what he has said earlier, is punishable as an offence.

From what has been said it appears to their Lordships that the latter kind of impassivity, when it occurs after the commission of an offence by another and has for its objective the giving of assistance to that other to escape, is under the law of South Africa punishable as the offence of being an accessory after the fact.

There can be no doubt that the appellant refrained from arresting the murderers on his arrival at the scene of the murder immediately after it had taken place, in order to assist them by giving them an opportunity to escape from justice. His subsequent conduct was designed to achieve the same object. That they were in fact brought to justice is not material to the question whether the appellant has been properly convicted. The conduct of the appellant taken as a whole leads to the inevitable

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conclusion that in rendering assistance he associated himself with the murder. In their Lordships' opinion he was under the law of South Africa, and consequently under the law of Basutoland, an "accessory after the fact," to the murder which had been committed.

Their Lordships think one further point needs some comment. Statutory penal provision under which the appellant could have been punished is to be found in the Native Administration Proclamation (Laws of Basutoland, 1949, cap. 54), section 14 of which says: "A Chief, Sub-Chief or Headman shall be liable to "a fine not exceeding fifty pounds upon conviction before a "Subordinate Court of the First Class or before the Court of the "Paramount Chief of any of the following acts or neglects—(a) if "he shall wilfully neglect to exercise the powers by this Pro- "clamation conferred upon him for or in respect of the prevention "of offences or the bringing of offenders to justice, or the seizure "of property stolen or believed to have been stolen; (b) if he "shall wilfully, and without reasonable excuse, refuse or neglect "to exercise any powers given or delegated to him under this "Proclamation;"

It has been suggested that the existence of this provision precludes the appellant from being punished as an accessory after the fact to the crime of murder. It sometimes happens that the elements which constitute a minor offence are present when a graver offence is committed. This is particularly true of minor offences created by statute. But whenever this happens no ground is furnished for not proceeding against the offender for the graver offence. It will be observed that "wilful neglect" of a duty imposed by the proclamation can occur without the objective of giving an offender an opportunity to escape. Where the latter element is present the offence of being an "accessory "after the fact" has been committed. Their Lordships are of the opinion that the statutory penal provision referred to does not stand in the way of the conviction in this case.

It was not disputed that the appellant, though charged with murder, could under the law of Basutoland be convicted of having been an accessory after the fact to murder.

For the reasons which they have given their Lordships have humbly advised Her Majesty that the appeal be dismissed.

Solicitors: *Hy. S. L. Polak & Co.; Charles Russell & Co.*

In re THE UNION OF THE BENEFICES OF WHIPPING-
HAM AND EAST COWES, ST. JAMES.

J. C.*

1954
Mar. 30.

DERHAM AND ANOTHER APPELLANTS;
AND
CHURCH COMMISSIONERS FOR ENGLAND . RESPONDENTS.

*Ecclesiastical Law—Union of benefices—Scheme—“Consultation so far
“as is practicable with . . . parochial church councils”—Meaning—
Pastoral Reorganization Measure, 1949 (12 & 13 Geo. 6, No. 3),
s. 3 (1).*

Where a scheme is proposed by the Church Commissioners for England for effecting the union of benefices it is desirable, in order to comply with the requirement in section 3 (1) of the Pastoral Reorganization Measure, 1949, of “consultation so far as is practicable” by the Pastoral Committee “with the . . . parochial church councils concerned,” that whoever represents the Pastoral Committee in consulting the council should state in terms that he has been requested to see and consult the council, to ascertain their views and to report them to the committee. Such a meticulous proceeding is not, however, essential, and all that is necessary to comply with the requirement of “consultation” is that a full and sufficient opportunity must be given to the members of the council to ask questions and to submit their opinions in any reasonable way. It is enough that the substance of the requirement should be complied with, and it is not necessary that a vote should be taken.

Accordingly, where the evidence established that at a meeting held for the purpose of explaining a proposed scheme for the union of two benefices, the members of the parochial church council opposing the scheme had had ample opportunity to state their views and should have known that their opinions were required, and they asked questions and made inquiries about the scheme as a whole and the particular matters about which they were concerned, there had not been a failure to “consult” the parochial church council concerned.

Rollo v. Minister of Town and Country Planning, 64 T.L.R. 25; [1948] 1 All E.R. 13 considered on the meaning of “consultation.”

This was an appeal by Erl King Hammond Derham and Reginald Albert Stark, respectively the secretary of the parochial church council and one of the churchwardens of Whippingham, with the support of the parochial church council, against a scheme, dated November 6, 1952, formulated by the respondents,

* *Present*: LORD PORTER, LORD TUCKER, and SIR JOHN BEAUMONT.

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the Church Commissioners for England, in pursuance of the Pastoral Reorganization Measure, 1949, and the Ecclesiastical Commissioners (Powers) Measure, 1938, for the union of the benefices of Whippingham and East Cowes, St. James, in the Isle of Wight and the diocese of Portsmouth.

The appellants alleged, *inter alia*, that the scheme was bad because the terms of section 3 (1) of the Pastoral Reorganization Measure of 1949 requiring "consultation so far as is practicable" with . . . the parochial church councils concerned "had not been complied with. They also submitted that the scheme ought not to be affirmed because the proposed union would result in the making of inadequate provision for the spiritual welfare of the people of Whippingham.

In their answer the Church Commissioners denied that there had been any failure to comply with the terms of section 3 (1) of the Measure of 1949, and submitted that full and sufficient consultation took place with the Whippingham parochial church council before recommendations leading to the scheme were made by the Pastoral Committee of the diocese of Portsmouth. The Church Commissioners also denied that as a result of the proposed union provision for the spiritual welfare of the people of Whippingham would become inadequate, and submitted that the scheme ought to be affirmed as assisting, in the words of section 3 (2) (a) of the Measure of 1949, "the making of the best possible provision for the ministry of the Word and Sacraments in the diocese as a whole, including the provision of appropriate spheres of work and conditions of service for all persons engaged in the cure of souls and the provision of reasonable remuneration for such persons."

The facts are stated in the judgment of the Judicial Committee.

1954. Feb. 15, 16, 17, 18. *Sir Frank Soskice Q.C.* and *J. G. Le Quesne* for the appellants. The question of consultation raises a small but very important point. The Union of Benefices Measure of 1923 prescribed the manner in which local public inquiries were to be conducted, and they afforded every conceivable safeguard for persons concerned. In the Measure of 1949 one found that whole procedure telescoped into a substitute in the phrase "consultation so far as is practicable." What was intended was consultation in a very real sense. For the meaning of "consultation" see *Rollo v. Minister of Town and Country*

*Planning.*¹ In the present case there has been no such consultation as is required. The affidavit evidence on behalf of the appellants showed that those present at the parochial church council meeting on October 10, 1951, when the Archdeacon, at their request, explained the scheme to them, did not realize that they were then expected to indicate their views on the proposed scheme, nor were they given to understand by anything which the Archdeacon said at that meeting that it was a process by which they were to be consulted. The Archdeacon reported to the Pastoral Committee that he considered that there was no objection to the scheme, but there is in fact the strongest objection to it. If it is accepted that consultation did not take place, then it is submitted that this was a scheme made ultra vires, was a nullity and should be quashed. If the parties desire to reconsider the matter, so be it.

Alternatively, if the Board are of opinion that they have a discretion in the matter, they should say that failure to consult properly is such a fundamental defect that they cannot overlook it, and that in their discretion the scheme would be dismissed. [Reference was made to *Parochial Church Council of Bradeston v. Church Commissioners for England*.²] It is a question in the last resort whether the council members at the meeting realized that they were being consulted. The affidavit evidence for the appellants showed that though questions were undoubtedly asked at the meeting, the impression was gained in fact that if objections were to be raised that should be done only after the scheme had been posted on the church door at a later stage. Not one person realized that the Archdeacon was present in order to welcome and obtain their advice and aid, and that they were expected to voice their opinions as distinct from obtaining an explanation, and in fact no member of the parochial church council did so. The Measure of 1949 required consultation in the fullest sense; here there was no consultation at all. The Archdeacon did not take steps which he should have taken to ensure that there was the requisite expression of opinion. He did not make it clear, as he should have done, that he had come to ascertain their views and invite the expression of their opinions. The use of a few words by him would have put beyond peradventure that he was there to consult. Not one affidavit for the appellants said that there had been consultation, and the inference which the Archdeacon

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¹ [1948] 1 All E.R. 13; 64 T.L.R. 25.

² [1951] A.C. 24, 33; 66 T.L.R. (Pt. 2) 243.

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drew—that there was no opposition to speak of to the scheme—turned out to be incorrect.

With regard to the merits of the scheme—it comes before the Board as *res integra*—the main anxiety of the appellants is that Whippingham will be prejudiced in favour of East Cowes in the matter of the ministrations which will be available. They should not be put in that position. The needs of the diocese as a whole have been considered, but there has been an omission to consider the needs and characteristics of the benefice of Whippingham. The Pastoral Committee have not discharged the onus, which is on them, of disclosing grounds which affirmatively justify them in imposing on the appellants a scheme which they dislike cordially. *In re Benefices of Great Massingham and Little Massingham*³ and *In re the Union of the Benefices of Westoe and South Shields, St. Hilda*⁴ indicate that there must be benefit to the parish which is to suffer. Those cases are relied on for general guidance rather than for the formulation of any precise principle by which the Board must be guided. The words “needs and characteristics of “the individual parish” are very wide, and must at least include the needs of parishioners viewed from the spiritual angle. This scheme does offend against that.

Le Quesne following. If this Board come to the conclusion that there was no proper consultation, then as a result of that the Pastoral Committee was given information which was in fact incorrect, and therefore reached their decision thinking that one important consideration was as in fact it was not. That, it is submitted, is a very strong ground for saying that this matter should not merely go back to the Church Commissioners, but right back to the Pastoral Committee where that can be put right. That can be effected only by the dismissal of the present scheme. Next, what is the effect if in fact there was consultation? The committee was told that there was no opposition. The statutory requirement was fulfilled, but for some reason the committee were misled on a very important point, and it is submitted that it is most unsatisfactory that the scheme should be allowed to become effective on that basis.

B. J. MacKenna Q.C. and *F. G. King* for the Church Commissioners. The duty of the Pastoral Committee in making recommendations in respect of a proposed scheme is to weigh the advantages against the inevitable disadvantages, and they are entitled to make recommendations which are advantageous to the

³ [1931] A.C. 328; 47 T.L.R. 294.

⁴ [1939] A.C. 269; 55 T.L.R. 349; [1939] 1 All E.R. 282.

diocese as a whole and to one of the two individual parishes even though they may be wholly disadvantageous to the other. The *Massingham* case⁵ and the *Westoe and South Shields* case⁶ did not raise the question of advantage to the diocese outweighing disadvantages to both of the parishes. They were cases under the Measure of 1923, one as amended by the Measure of 1926, and there was nothing in either of them at all comparable with the Measure of 1949. The Board will not interfere unless it is plain that the authorities responsible for making the scheme have disregarded principles laid down for their guidance. In any event, the Board will give the greatest weight to administrative decisions reached by parties who are expressly fitted to make such decisions.

With regard to the merits, it was said for the appellants that if the scheme were affirmed Whippingham would be spiritually starved, but it is obvious that any reasonable man in the position of rector of a united benefice would be scrupulous in not preferring the interests of one parish to another.

"Consultation" involves the duty of giving to the persons consulted an opportunity of expressing their views. When the subject-matter of the consultation is a draft proposal, the terms of it must first be explained to the persons consulted. That is the whole duty: that, it would appear, is what Bucknill L.J. said in effect in *Rollo's* case.⁷ The duty is performed if the agent who goes gives the people a chance of stating their views, even though the agent afterwards may misapprehend or fail to express to his principal the real views of the people who had been consulted. Admittedly, the persons to be consulted must be made aware that the opportunity to state their own views exists. The persons consulting must act reasonably, and equally they are entitled to assume that the persons whom they are consulting are reasonable persons who will in turn act reasonably. If the circumstances are such that a reasonable person in the position of the persons to be consulted will understand that he is being consulted, then there is "consultation."

The Archdeacon had a conception of the duty of consultation which involved hearing the views of the people to be consulted. He took that duty seriously. There was discussion in which conflicting views were expressed about the scheme. After he had left the meeting he was satisfied himself, rightly or wrongly, that the duty of consultation had been discharged. It is almost inconceivable that he should not have said that he had come to

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⁵ [1931] A.C. 328.⁷ [1948] 1 All E.R. 13.⁶ [1939] A.C. 269.

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hear their views. In none of the affidavits for the appellants was there a statement that the deponent said to the Archdeacon that he was opposed to the scheme. The affidavits for the respondents did establish that there was consultation. The Archdeacon told them that he wanted their views. [On "consultation" reference was also made to *Fletcher v. Minister of Town and Country Planning*.⁸]

The provision in section 3 (1) is directory only, not mandatory. If there are several conditions to be complied with, and if one is held to be directory and not mandatory, the scheme is not a nullity if that condition is not complied with. Section 3 (4) of the Measure of 1949 enables the Bishop, after the consultation, to vary the scheme, and there has to be no further consultation. That is an indication that consultation is not really the corner stone so that if it does not take place the structure collapses.

Sir Frank Soskice Q.C. in reply. The public inquiry provisions of the Measure of 1923 are telescoped into the "consultation" phrase in the Measure of 1949: from beginning to end of the latter Measure there is no provision for the expression of personal views except that which is included in section 3 (1). The provision as to consultation is so fundamental that the Board should not say that the defect can be cured. [Reference was made to *Woodward v. Sarsons*.⁹] For "consultation" there must be something which does in fact have the result of eliciting the collective view of the council.

Mar. 30. The judgment of their Lordships was delivered by LORD PORTER. Their Lordships have in this instance to determine what advice they shall tender to Her Majesty in the matter of a proposed scheme for the union of the benefices of Whippingham and East Cowes, St. James, in the Isle of Wight—a scheme which has been objected to by the parochial church council of the former parish. The actual appellants are Mr. Erl King Hammond Derham, who is secretary of the council, and Mr. Reginald Albert Stark, who is a member and also a churchwarden. These two gentlemen now have the support of all the other members of this council, though at one time one at least was opposed to the prosecution of the appeal on the ground of expense.

Before coming to the grounds of opposition it is in their Lordships' opinion necessary to set out the procedure by which a scheme is prepared, certified and brought into operation. The

⁸ [1947] 2 All E.R. 496, 500-1; 63 T.L.R. 499. ⁹ (1875) L.R. 10 C.P. 733.

relevant provisions, so far as is material to the first objection put forward on behalf of the appellants, are to be found in section 3 of the Pastoral Reorganization Measure, 1949, the opening words of the first subsection of which read as follows: "3 (1) It shall "be the duty of the Committee [i.e., the Pastoral Committee "appointed under section 1] from time to time as may be directed "by the bishop to make a general survey of the diocese either "as a whole or in sections, and after consultation so far as is "practicable with the incumbents and parochial church councils "concerned to make recommendations . . ." etc.

For the purpose of this part of the appellants' submissions it is not necessary to quote further from the subsection. Upon that wording it is contended on behalf of the appellants that it is imperative before making a scheme that the Pastoral Committee should consult with the parochial church council, that such consultation involves at least the knowledge of the council that it is being consulted and asked for its views, that in the present instance no such consultation took place and that without such consultation the scheme is null and void.

The incidents to be considered took place some three years ago, and not unnaturally there is a considerable divergence of recollection as to what actually took place. The question of a union came under consideration some years ago when the Bishop of the diocese visited Whippingham in July, 1950, and though it is apparent that a certain amount of discussion had already taken place in the parish, their Lordships do not think it necessary to trace the history of the case before that date.

Some of the objectors take the view that the Bishop on that occasion stated that an amalgamation with East Cowes would only be a temporary measure, but on a careful reading of the minute of that meeting it is clear that the word "temporary" was used with reference to the appointment of the vicar of East Cowes as sequestrator and priest in charge of Whippingham until amalgamation or union took place. Obviously such an appointment must be a temporary measure, whereas it is plainly impossible that a union of benefices should take that form, and if any members of the parochial church council thought that the Bishop's observations went beyond the intervening period, nothing was said from which such a conclusion could be drawn and, indeed, the minute itself shows that the Bishop continued his remarks by saying that the measure would be temporary until either an amalgamation or union took place or the appointment of another rector, of which he was doubtful.

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During the next year the Pastoral Committee was engaged in preparing a provisional scheme, and on September 4, 1951, after it was completed, the Archdeacon of Portsmouth, who is, *virtute officii*, a member of the Pastoral Committee, visited the island accompanied by Mr. Ward, who was chairman of the Isle of Wight sub-committee of the Pastoral Committee of Portsmouth. There they met the Rev. E. F. King, who was vicar of East Cowes and priest in charge of Whippingham.

At that interview Mr. Ward went through and explained the scheme to Mr. King, and the latter agreed to put it before the councils of East Cowes and Whippingham at their next meetings. The Archdeacon, though he took the view that, if the provisions of the scheme were fully appreciated and understood and approved by the two councils it would be unnecessary for him to visit them, yet thought it essential that he should come unless it was clear that they were fully satisfied, and he so informed the vicar.

In fulfilment of his promise Mr. King at a meeting of the parochial church council held on September 24, 1951, read out the provisional scheme and explained that the proposal involved a union of benefices, not of parishes. The minutes of this meeting have been exhibited and end with the words: "A discussion took place about the subject and the future status of the rectory, and it was decided to ask the Archdeacon to come over in the near future and make the subject plain to us."

It should be explained that the council had expended a considerable sum on the repair and rearrangement of the rectory, were proposing to spend more and were anxious that at least the two main rooms should be left to be used for parish purposes, and that at this meeting a discussion had already taken place on this subject before the union of benefices came up for consideration.

As a result of this intimation Mr. King wrote to the Archdeacon asking him to come to a meeting of the parochial church council and explain the scheme. In compliance with this request, the Archdeacon went to Whippingham and attended a meeting of the council on October 10, 1951. The minutes of this meeting have also been produced. It is stated to have been informal, as indeed it may well have been since no written notice of it appears to have been given. But all its members knew of it and all attended except Mr. Foss, whose affidavit has been in evidence and who makes no complaint of ignorance that it was to be held. As the meeting was informal the minute was informal also, and accordingly Mr. King, as chairman, thought that it should not be

signed by him. It was therefore signed by Mr. Derham, but for some reason which was unexplained, the signature is dated October 10, 1951, the day on which the meeting took place, and not at the next meeting at which Mr. King declined to sign. The material portion runs as follows: "The Archdeacon explained " the whole proposition as regards the living and rectory house. " Questions were asked and answered by the Archdeacon, who " assured the council that Whippingham would still have its own " churchwardens, council and management of its own affairs " under the new scheme and that the title would be the United " Benefice of Whippingham and East Cowes, and the minister " would be rector of Whippingham and vicar of East Cowes and " would reside in the vicarage of East Cowes."

To this minute there is attached an addendum signed on October 19 by Mr. Derham, headed " Recorded as record only," and containing the following words: " The Archdeacon informed " the council that any objection of any nature could only be " discussed after the official notice of union or amalgamation had " been posted on the church door."

Mr. Derham, whose affidavit has been filed, states that he is sure this record is accurate, but does not explain why it was inserted after the minutes, why it is so dated, when he signed it or state whether it was shown to any of the members of the council. So far as certain other portions of Mr. Derham's affidavit are concerned, it appears that he either misunderstood the proposal, or, not unnaturally, has forgotten the exact details. The Archdeacon could not, as Mr. Derham states, have said that any objection of any nature could only be discussed after the official notice had been posted, though no doubt, as Mrs. Jolley says and Miss Harvey indicates, both of whom are members of the council, he told them, and told them accurately, that formal objections must be made after the scheme had been published. Similarly, Mr. Derham must be mistaken in supposing that the Archdeacon said that the scheme was temporary or spoke of a five years' period. The scheme was, of course, provisional until promulgated by the Church Commissioners, but never was or could be temporary, nor could any question of five years arise. From both his and the affidavits of the other members of the council, it is obvious that there was an underlying opposition to the scheme, but it is notable that no one says that the scheme was opposed—all that they say is that no one spoke in its favour. It is clear at least that the Archdeacon was fully and closely questioned, perhaps particularly as to the effect of the scheme on the use of the rectory.

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Mr. King stated that though he does not remember exactly in detail what took place at the meeting of September 24, yet he is positive that he read the scheme from beginning to end and explained to the members that their views were required.

The Archdeacon, on his part, whilst being doubtful* of the sequence in which the matters were discussed, has no doubt of his having gone through the scheme, talked about it and said that he was ready to answer questions and discuss and hear the views of the members of this council.

On this evidence their Lordships are of opinion that the members had ample opportunity to state their views and should have known that their opinions were required. There was undoubtedly a full spate of questions and the opponents appear to have freely made inquiries about the scheme as a whole and the particular matters about which they were concerned. Moreover, Mr. King and the Archdeacon were fully persuaded that the council knew that their views were being asked in order that they might be reported to the Pastoral Committee.

It was put, however, to their Lordships that in order to constitute a consultation, (1) the members of a council must know that they were being consulted, and even if their failure to recognize what was taking place was entirely due to their own mistake, no consultation such as is prescribed by the Measure could be held to have taken place unless they understood that their views were required; (2) the consultation must be with the council, and consequently the views of individual members, even if freely and fully expressed, were not sufficient compliance with the enactment. A vote of the council itself was required.

Their Lordships cannot accept this argument. In case, however, a parochial church council should not fully appreciate that the views of its members were required, they think it would, as a rule, be desirable that whoever represents the Pastoral Committee in consulting the council should state in terms that he has been requested to see and consult the council, to ascertain their views and to report them to the committee.

But in their Lordships' opinion, though advisable, so elaborate and meticulous a proceeding is not essential. A full and sufficient opportunity must be given to the members of the council to ask questions and to submit their opinions in any reasonable way, but that is all that is required.

In reaching their conclusion their Lordships would point out that, whereas under the Measure of 1923 a public inquiry was enjoined, a much less formal procedure was prescribed in the

Measure of 1949. The natural inference is that thereafter the strict and elaborate provisions contained in the earlier Measure were intended to be succeeded by a more elastic and flexible procedure in the future.

They do not find themselves able to lay down the rule that some exact wording should be used or specific statements made. It is enough, as they think, that the substance of the requirement should be complied with. In the present case they are not satisfied that a failure to consult the parochial church council has been made out. The result is that a valid scheme has been put forward and approved by the Church Commissioners. They would add that it is not necessary that a vote should be taken. It would have been easy to require a resolution of the council if that was intended, whereas the more informal word "consultation" is used.

There is no direct decision under the Union of Benefices Measures, but attention was called to the decision of Morris J. and of the Court of Appeal in *Rollo v. Minister of Town and Country Planning*.¹ The observations in that case relied on by the present appellants are best exemplified by a quotation from the judgment of Bucknill L.J. which runs as follows²: "Consultation" in the subsection "means that, on the one side, the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender that advice."

The scheme, its objects and the provisions for bringing it into force differ in the case of the Measure now under consideration from those of the Town and Country Planning Act, but even if the Lord Justice's words be given their full significance, their Lordships are of opinion that this injunction was carried out in the present instance.

There remains, however, the further question whether the scheme itself is one which, in the words of the Measure, makes the best possible provision for the ministry of the Word and Sacraments in the diocese as a whole, including the provision of appropriate spheres of work and conditions of service for all persons engaged in the cure of souls and the provision of reasonable remuneration for such persons.

In the course of the hearing before their Lordships' Board

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¹ 63 T.L.R. 499; [1947] 2 All E.R. 488; 64 T.L.R. 25; [1948] 1 All E.R. 13.

² [1948] 1 All E.R. 17.

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certain cases by which it was urged that their decision should be guided were brought to their notice. One of them, viz., *In re Benefices of Great Massingham and Little Massingham*,³ was decided under section 2 (6) of the Measure of 1923, and the other, viz., *In re the Union of the Benefices of Westoe and South Shields, St. Hilda*,⁴ under that Measure as amended in 1936. In the latter case it was held that the amendment did not affect the construction of the earlier subsection, and though their Lordships have in fact carefully taken into consideration the circumstances and interest of the parishes affected, they would point out that in the Measure of 1949 particular stress is laid upon the interest of the diocese as a whole or in part, whereas no such provision is contained in the earlier Measure. It follows that, under the later Measure, the advantages of the individual parishes must be considered in connexion with that wider outlook.

In their petition the opponents of the scheme point out that the two parishes differ in type, Whippingham being in the main agricultural, whereas East Cowes is industrial: that the latter parish was originally carved out of the former, which is an ancient parish and, having had and having still a royal pew and chapel reserved for the Princess Beatrice, attracts a large number of visitors: that it has a vigorous church life and that they fear a starvation of the spiritual life of the parish if the two benefices are united. In their submission the result would be that the attention of the incumbent and curate would be centred too much in East Cowes and that for that parish alone there is need of a parish priest free from other duties. Moreover, they maintain that Whippingham is increasing in population and itself requires an independent incumbent.

Their Lordships appreciate and have considerable sympathy with the feelings of the opponents of the scheme. Nevertheless, they feel constrained humbly to advise Her Majesty to affirm it.

To some extent, no doubt, the type of parishioner in the one parish varies from the type of parishioner in the other, and Whippingham is becoming more populous, but the two parishes are still to retain their identity and the increase in the numbers of Whippingham is taking place on the border of East Cowes and constitutes, if anything, an addition to the urban rather than to the agricultural population. If the suggestions were that the two parishes should be united their Lordships would have grave doubts as to the propriety of the step, but each keeps its identity

³ [1931] A.C. 328; 47 T.L.R. 294.

⁴ [1939] A.C. 269; 55 T.L.R. 349; [1939] 1 All E.R. 282.

and institutions, and the real question is whether the union of benefices and consequent provision of an incumbent and a curate form an adequate provision for the supervision of the church life of the parish of Whippingham and for the conduct of its services.

No doubt if there were ample resources and an abundant supply of clergy, the two benefices might with advantage remain separate. But their Lordships, like the Pastoral Committee, are obliged to take into consideration not only the individual parishes but also the diocese as a whole and the provision of reasonable remuneration. No suggestion is made by the petitioners for the provision of any further endowment for East Cowes, apart from the scheme, and though two clergy may still be required, one will be a curate and together they can work the two parishes more efficiently than if each is left to the exertions of its own parish priest.

It was at one time apparently feared that under the scheme Whippingham would lose its parsonage house, but this is not so, and it has now been assured that the Church Commissioners will offer the rectory to the Diocesan Board of Finance at a nominal figure so that the rectory may be used at the board's discretion for parochial purposes.

For these reasons their Lordships do not think that the petitioners have shown sufficient grounds to lead them to reject the scheme, and accordingly they will humbly advise Her Majesty to affirm it.

Solicitors: *Warren & Warren, for Buckell & Drew, Isle of Wight; Milles, Day & Co.*

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[HOUSE OF LORDS.]

SNEDDON AND OTHERS	APPELLANTS; H. L. (Sc.)*
AND	
LORD ADVOCATE	RESPONDENT.
	1953
	Nov. 9, 10.
	1954
	Jan. 25.

Revenue—Estate duty—Gift inter vivos—Trust fund—Cash payment subsequently invested—Truster's death within five years—Valuation for purposes of estate duty—Time—Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), ss. 38 (2) (a), 39—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c).

* *Present*: LORD MORTON OF HENRYTON, LORD MACDERMOTT, LORD REID and LORD KEITH OF AVONHOLM.

H. L. (Sc.) *Trust and Trustee—Trust fund—Conception as continuing entity.*
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By section 2 of the Finance Act, 1894: “Property passing on “the death of the deceased shall be deemed to include . . . “(c) Property which would be required on the death of the deceased “to be included in an account under section 38 of the Customs and “Inland Revenue Act, 1881. . . .” By section 38 (2) (a) of the Act of 1881, as amended, there must be included in such an account any property taken under a disposition made by the deceased purporting to operate as an immediate gift inter vivos by way of declaration of trust which shall have been made within five years before his death.

A voluntary trust deed, which operated as an immediate gift inter vivos, was granted in 1946 by a truster, the sum of £5,000 being put in trust and the trustees being directed to hold and apply it “or investments representing the same” for the benefit of certain limited interests. Shortly after the execution of the deed the trustees invested the sum in the purchase of certain shares which on the truster’s death in 1948 were worth £9,250, and for the purposes of estate duty the gift was assessed at that sum:—

Held (per Lord Morton of Henryton, Lord Reid, and Lord MacDermott, Lord Keith of Avonholm dissenting), that the property deemed to pass on the death of the deceased was the £5,000 and not the trust fund in the state of investment at the death of the truster, viz., the shares, and accordingly the assessment should have been on the former.

In re Payne, Poplett v. Attorney-General [1940] Ch. 576; 56 T.L.R. 525; [1940] 2 All E.R. 115 questioned.

Decision of the Second Division of the Court of Session (sub nom. *Hetherington’s Trustees v. Lord Advocate*) 1953 S.C. 66 reversed.

APPEAL from the Second Division of the Court of Session.

This was an appeal against an interlocutor dated October 10, 1952, pronounced by the Second Division of the Court of Session as the Court of Exchequer in Scotland in an appeal under the Finance Act, 1894, s. 10, against an assessment dated January 9, 1952, for estate duty made by the Commissioners of Inland Revenue in respect of property held by the appellants, George Sneddon, John Duncan and Thomas Reid, as trustees under a deed of trust. By the interlocutor appealed from, the court by a majority (Lord Justice-Clerk Thomson, Lord Patrick and Lord Mackintosh, Lord Mackay dissenting) sustained the assessment complained of.

The facts, which were not in dispute, were set out by Lord Morton of Henryton and Lord Reid as follows: On December 19, 1946, William Galbraith Hetherington executed a deed of trust

whereby, having declared that for certain reasons he had "resolved to make provision for" his daughter, Miss Elizabeth Jamieson Hetherington, "in manner aftermentioned," he nominated himself and three others as trustees "for the ends, uses and purposes aftermentioned," and declared that "the trust fund consists of the sum of £5,000 sterling which is vested in the trustees and which, or investments representing the same, shall be held and applied for the trust purposes afterwritten, videlicet." Those purposes were, briefly, to pay to the truster's daughter, Miss Elizabeth Jamieson Hetherington, for her liferent alimentary use allennarly the income of the trust fund, on her death leaving issue to pay the trust fund to her issue, and in the event of her dying without leaving issue surviving to pay the trust fund to her sister, whom failing, to the issue of her sister, whom all failing, to the heirs in mobilibus of the truster. The trust deed gave the trustees wide powers of investment, including power to purchase, subscribe for, pay for and take up any shares or stock in three named companies, including Creamola (England) Ltd.

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On December 21, 1946, the trustees' solicitors, on the instructions of the trustees, applied for an allotment of £5,000 new £1 ordinary shares of Creamola (England) Ltd. at par. On that date and at the date of his death the truster was a director of that company and had a controlling interest in it. On December 24, 1946, the truster, by cheque in favour of the trustees' solicitors, paid over to the trustees the sum of £5,000 to be held by them on the trusts declared by the deed of trust. On the same date the trustees' solicitors sent their own cheque to Creamola (England) Ltd. in payment of £5,000 due in respect of an application by the trustees for an allotment of 5,000 new £1 ordinary shares in that company. These shares were allotted to the trustees and are still held by them. They were at the time of the truster's death, and still are, the only investment held by the trustees.

The truster died on February 5, 1948, and thus did not live for a period of five years after the execution of the deed of trust and the payment of £5,000. The value of the shares at that date was agreed at £9,250.

R. P. Morison Q.C. (of the English Bar, Q.C. of the Scottish Bar) and *W. I. Fraser Q.C.* (of the Scottish Bar) for the appellants. This case depends on section 2 (1) (c) of the Finance Act, 1894, and section 38 of the Customs and Inland Revenue Act, 1881. There is no dispute as to what the property handed over by the truster to the trustees was; it was a cheque drawn for

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£5,000—a right to receive £5,000 in money. (The drawing of the cheque and the handing it over was the disposition.) The dispute is as to what is the property which is deemed to pass on the truster's death by reason of section 2 (1) (c) of the Act of 1894. The court below has held that it was the settled property as a unit. This was wrong in law. The property taken as the subject of the gift (i.e., the capital transferred and, accordingly, the property taken) was £5,000 in cash. It was the same as that given by the truster, the sum of cash by which he depleted his estate. This is so both on the facts and on the words of the Act, under which the test is for the donee to ask: What did the donor give me? To call the gift a trust fund is merely to say that the property was given subject to certain trusts. The appellants' argument is consistent with *Lord Strathcona v. Inland Revenue*,¹ where it was held that the property donated must be treated as if no gift had been made and that property had remained part of the deceased's estate, passing on his death. That decision, which affords authority for determining the present case, was applied in *Attorney-General for Ontario v. National Trust Co. Ltd.*² See also *Attorney-General v. De Prévile*.³ In this case the same test should be applied as was applied in *Attorney-General v. Oldham*.⁴ If those cases are right this trust fund cannot be property within section 38 as the court below held. The last-named case and *Lord Strathcona v. Inland Revenue*⁵ were cases of outright gifts without the interposition of a trust, but a trust, such as that in the present case, is mere machinery and does not affect the question: What was the subject of the gift? In this class of case there is no difference between settled and unsettled property. *In re Payne*,⁶ if correctly decided, is distinguishable. It is not satisfactory as an authority because all the judges differed widely in the reasoning on which their opinions were based. The judgment of Clauson L.J. was wrong: if he were right this appeal could not succeed. The judgment of Scott L.J. is also attacked. Luxmoore L.J. is the nearest to being right.

W. R. Milligan Q.C. (Solicitor-General for Scotland), *J. H. Stamp* (of the English Bar) and *W. R. Grieve* (of the Scottish Bar) for the respondent. The only question to be determined is

¹ 1929 S.C. 800.

² [1931] A.C. 818, 822; 47 T.L.R. 625.

³ [1900] 1 Q.B. 223, 228, 230, 232; 16 T.L.R. 125.

⁴ [1940] 1 K.B. 599, 608, 610; 56 T.L.R. 484; [1940] 2 All E.R. 321;

(C.A.) [1940] 2 K.B. 485, 488; 56 T.L.R. 926; [1940] 3 All E.R. 450.

⁵ 1929 S.C. 800.

⁶ [1939] Ch. 865; 55 T.L.R. 996; [1939] 3 All E.R. 875; (C.A.) [1940] Ch. 576, 589, 590, 601, 604; 56 T.L.R. 525; [1940] 2 All E.R. 115.

whether the cash or the shares must be deemed to pass on the trustor's death. The Crown's case is that the property taken was the trust fund. The conception of settled property is one thing and of unsettled property another. In this sort of case there is all the difference in the world between them. Otherwise it is hard to see how *Attorney-General v. Oldham*⁷ and *In re Payne*⁸ can live together. The former was decided just before the latter. Both were correctly decided, but to allow this appeal would inevitably mean holding that the latter was wrongly decided. The Crown relies on it. Similarly if, in this connexion, there be no difference between a trust and an out-and-out gift, *In re Payne*⁸ and *Lord Strathcona v. Inland Revenue*⁹ cannot stand together. In the latter case and in *Attorney-General for Ontario v. National Trust Co. Ltd.*¹⁰ there is no suggestion of a trust fund at all. Only in *In re Payne*¹¹ does the question of a trust fund arise. In *Lord Strathcona v. Inland Revenue*¹² Lord Sands was not thinking of a trust fund when he made the remarks approved in *Attorney-General for Ontario v. National Trust Co. Ltd.*¹³ *In re Payne*,¹⁴ which was correctly decided, is the crux of the matter. There the judges had clearly before them the distinction between the cases of a settled fund and of an out-and-out gift. See also *In re Hodson's Settlement*.¹⁵

A gift of £5,000 in cash and one of £5,000 in trust are essentially two different things. In the case of an out-and-out gift of £5,000 the entity is the £5,000. In the case of a gift of £5,000 by way of settled fund the entity is the trust fund. In this case the words of the provision declaring that the trust fund consists of £5,000 indicate this. What was settled was the trust fund, and it retained its identity, despite any changes in investment, throughout the duration of the trust. The "property taken" was represented as truly by the shares as by the money, since the trust fund was a species of property itself, distinct from, but embracing, such property as might be, from time to time, subject to the trust. The entity is the same all the way through, though it may consist of different units. Where there is no trust the property which in fact passed at the earlier date is deemed to have passed at the donor's death. But it is otherwise where there is

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⁷ [1940] 2 K.B. 485.⁸ [1940] Ch. 576.⁹ 1929 S.C. 800.¹⁰ [1931] A.C. 818.¹¹ [1940] Ch. 576.¹² 1929 S.C. 800.¹³ [1931] A.C. 813.¹⁴ [1939] Ch. 865, 871, 874-5;
[1940] Ch. 576, 582, 586, 589, 592.¹⁵ [1939] Ch. 343, 369-70; 55
T.L.R. 357; [1939] 1 All E.R. 196.

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a declaration of trust and the donor is trustee, since no property actually passes when the gift is made and the "property taken" consists of the rights conferred on and taken by the beneficiaries under the declaration of trust. The beneficial interest must thus be valued at the date of the donor's death. The disposition here was the execution of the trust deed. Section 39 of the Act of 1881 supports the Crown's contentions.

J. H. Stamp following. The Crown's position is based on two converging lines of argument. (1) It relies on the direct construction of the two relevant sections: section 38 (2) (a) of the Customs and Inland Revenue Act, 1881, and section 2 of the Finance Act, 1894. (2) It relies on the general proposition that the Acts, so far as they relate to death duties, regard the trust fund as a continuing corpus with a continuing identity. This was accepted by Simonds J. in *In re Payne's Declaration*.¹⁶

In this case the disposition that effects the gift is the declaration of trust. That is what passes the beneficial interest from the transferor to the beneficiaries. One must therefore look at the property which the beneficiaries got under the declaration of trust and ask what it brought them. That is what must be valued. In ordinary speech a settled fund is regarded as a unit, a continuing corpus, and the Finance Acts adopt this view. This is enough to carry the Crown home. Section 5 of the Act of 1894 would produce an anomaly if change of investment altered the identity of the fund. (All that the definition of settled property in section 22 (1) (h) did was to say that it meant "property comprised in a settlement.")

A trust fund has a continuing identity: see section 8 (3) and section 21 of the Act of 1894; section 15 of the Finance Act, 1896; section 11 of the Finance Act, 1900; section 59 of the Finance (1909-10) Act, 1910; section 14 (b) of the Finance Act, 1914.

The assumption that the settled fund is an identifiable corpus with a continuing identity is necessary to protect the taxpayer in many cases under the Finance Acts, since otherwise the reliefs could not be operated properly, as in the case of the position when duty is payable on a trust fund on a husband's death before his wife. Under the various sub-paragraphs of section 2 (1) of the Act of 1894 double taxation of what is in effect the same property might arise unless the continuing identity of the settled fund is acknowledged, notwithstanding changes in the constituent parts of the fund.

¹⁶ [1939] Ch. 865.

Morison Q.C. in reply. The property taken here within section 38 (2) of the Act of 1881 is the sum given and not the totality of the beneficial interest in the property: see *In re Payne*.¹⁷ The second alternative is inconsistent with levying estate duty on property. The language used in the section does not refer to beneficial interests at all. All it refers to is property taken under a disposition purporting to operate as an immediate gift. There is no warrant in the language for drawing a distinction between an out-and-out gift and a trust. In the case of a trust the immediate gift *inter vivos* is only to the trustees.

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Their Lordships took time for consideration.

Jan. 25. LORD MORTON OF HENRYTON [having stated the facts] : My Lords, section 2 (1) (c) of the Finance Act, 1894, as amended by subsequent legislation, provides that property passing on the death of the deceased shall be deemed to include (*inter alia*) “any property . . . taken under a voluntary disposition, made by “any person . . . purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust “or otherwise, which shall not have been *bona fide* made five “years before the death of the deceased.” Section 7 (5) of the same Act provides: “The principal value of any property shall be “estimated to be the price which, in the opinion of the Commis- “sioners, such property would fetch if sold in the open market “at the time of the death of the deceased.” No one doubts that the truster made a disposition which comes within the section and that estate duty is payable upon certain property which is deemed to pass upon his death, but the question is: What is the property which is deemed to pass; is it the £5,000 or is it the trust fund constituted by the deed of trust, in its state of investment at the death of the truster, i.e., the Creamola shares? It is common ground that £9,250 was the value of the Creamola shares at the truster’s death. Thus no question as to value or as to the proper method of valuation arises in the present case.

What, then, is the property which is deemed to pass? The statute says it is the “property taken” under the disposition made by the truster. My Lords, I feel no doubt that the property taken under that disposition was the sum of £5,000. That was the only property which passed from the truster, and it was the only property taken by the trustees from the truster under his disposition. They took that property, of course, as trustees for

¹⁷ [1940] Ch. 576, 592, 599.

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the beneficiaries under the deed of trust. The truster never owned the 5,000 Creamola shares and, therefore, these shares could not be "taken" under any disposition made by him. As soon as the trustees received the £5,000 it became in their hands a trust fund to be held on the trusts declared by the deed of trust, and it was, of course, proper for the trustees to invest that sum in some one or more of the numerous investments authorized by the trust deed. They invested it in the Creamola shares, but they did not take these shares under the disposition made by the truster; they took the shares because, in the exercise of their discretion, they decided to apply for them and because the company decided to allot them to the trustees.

Some discussion arose in the course of the argument as to whether the "disposition" in the present case was the drawing of a cheque for £5,000 by the truster, coupled with the sending of the cheque to the trustees' solicitors, or was the execution of the trust deed by the truster. I think that the former is the true view, because the trustees "took" nothing until the £5,000 reached their solicitors, but to my mind it makes no difference to the result of this appeal whether the "disposition" was made by the cheque or by the trust deed. In the former case the disposition carried the sum of £5,000 and nothing else. In the latter case the truster, by the trust deed, "disposed" of property which was to be vested by him in the trustees, and that property was again £5,000 and nothing else.

At one time counsel for the Crown seemed disposed to place some reliance on the words in the trust deed: "And I provide" and declare that the trust fund consists of the sum of £5,000 "sterling which is vested in the trustees and which, or investments representing the same, shall be held and applied for the" trust purposes afterwritten, *videlicet*:—"In my view these words are far indeed from helping the Crown. The truster declares that the trust fund consists of £5,000. Must not the "property" . . . taken under a disposition" be the sum which he declares to be the trust fund? The words "and which, or investments" representing the same," etc., in no way assist the Crown. They merely introduce the trusts upon which the trustees are to hold the trust fund (already defined as the sum of £5,000) or the investments which the trustees decide to make with that fund.

My Lords, if the gift of £5,000 had been made to a donee who was to retain it for his own benefit, there could surely have been no doubt that duty would have been payable, on the donor's death within five years, on £5,000 cash, even if the donee had

forthwith invested the gift in Creamola shares and still held these shares at the donor's death. If authority were needed for this proposition, it is to be found in *Lord Strathcona v. Inland Revenue*,¹ applied and approved in *Attorney-General for Ontario v. National Trust Co. Ltd.*²; see also *Attorney-General v. Oldham*.³

There is, however, one case in which a distinction appears to have been drawn between a gift to a person for his own benefit and a gift to trustees for the benefit of persons entitled in succession. That is *In re Payne's Declaration*.⁴ The three learned judges who formed the majority in the Second Division of the Court of Session in the present case all placed some reliance on *Payne's* case,⁴ but, in my view, it was wrongly decided. I can see no logical distinction, for the present purpose, between any of the following cases: (1) A.B. gives cash or transfers shares to C.D. for his own benefit; (2) A.B. declares that he will henceforth hold a sum of cash or a block of shares in trust for C.D. for life with remainder to other beneficiaries; (3) A.B. gives cash or transfers shares to C.D. and E.F. upon trust for G.H. for life with remainder to other beneficiaries. In each case the *property taken* is the cash or shares which the donor gives or transfers or whereof he declares trusts. The tax under section 2 (1) (c) is a tax upon "property taken under a disposition . . . "purporting to operate as an immediate gift inter vivos." It is a tax upon certain defined *property*, and it is necessary to look at the moment when the gift was made in order to see what that property was; it is not a tax upon beneficial interests in property and it matters not whether the gift was made (to quote the subsection) "by way of transfer, delivery, declaration of trust or "otherwise." It is noteworthy that in *Payne's* case⁵ Simonds J. (as he then was) appears to have felt some doubt whether the words of the statute entitled him to "isolate gifts by way of "settlement from other forms of gift." I think that this doubt was well founded, and I cannot find any words in the statute which justify such isolation. It is also to be noted that the three members of the Court of Appeal, though they were unanimous in dismissing the appeal, all gave different reasons for their decision.

Counsel for the Crown submitted that what was settled was

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¹ 1929 S.C. 800.

² [1931] A.C. 818, 822-3; 47 T.L.R. 625.

³ [1940] 1 K.B. 599; 56 T.L.R. 484; [1940] 2 All E.R. 321; (C.A.) [1940] 2 K.B. 485; 56 T.L.R. 926; [1940] 3 All E.R. 450.

⁴ [1939] Ch. 865; 55 T.L.R. 996; [1939] 3 All E.R. 875; (C.A.) [1940] Ch. 576; 56 T.L.R. 525; [1940] 2 All E.R. 115.

⁵ [1939] Ch. 865, 876.

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a trust fund, and that a trust fund retains its identity as a trust fund notwithstanding any changes in its investment. I agree that the £5,000 became a trust fund as soon as it passed from the settlor to the trustees, but the property which the trustees "took" from the settlor was £5,000. I agree also that a trust fund, once constituted, retains its identity as *the* trust fund held upon certain trusts, notwithstanding any changes which may be made in the investments constituting it, but that fact seems to have no relevance in the present case.

It was suggested by counsel for the Crown that section 39 of the Customs and Inland Revenue Act, 1881, supported the argument for the Crown, but I do not think that that section throws any light upon the matter. Its wording can readily be applied to the ordinary case where property actually passes on a death, but its effect becomes somewhat obscure when it is applied to property which the deceased gave away during his lifetime but within five years of his death. If the property were given to a person beneficially entitled thereto, it is impossible to suppose that that person would deliver an account under section 39 "upon retaining the same for his own use," for at the time when he retains it for his own use he cannot tell whether the donor will or will not live five years. If the property were given to trustees upon trusts for persons entitled in succession, they might still hold it upon subsisting trusts at the donor's death, or they might have "distributed" it in his lifetime to persons becoming absolutely entitled (who would then "retain the same "for their own use"), or they might have "disposed of" it in some manner permitted by the terms of the trust. In any of these events the words "upon . . . distributing or disposing "thereof" do not fit the case, and in each case, as it seems to me, it is necessary to fall back upon the words "in any case "within six calendar months after the death of the deceased." Trustees who no longer held the property given to them by the deceased, but who held investments, representing the original property, on trusts which were still subsisting at the donor's death, would have to decide whether they ought to include in the account the property which they originally "took" from the donor, or the investments representing that property at the date of the donor's death. In my view section 39 affords them no assistance in making this decision.

My Lords, I fully realize that difficulties as to the method of valuation arise in some cases, if the property which is to be valued as at the date of the donor's death is property taken by

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a donee some years before. Some of these difficulties were discussed by the Lord President and by Lord Sands in *Lord Strathcona's* case,⁶ and they were not agreed as to how these difficulties were to be solved. In my view, however, these difficulties arise, in the case, for instance, of a gift of a race-horse, by reason of the wording of the relevant statutory provisions. It is perhaps surprising that gifts *inter vivos* should be valued as at the death of the donor and not as at the date of the gift. The latter value represents that which was withdrawn from the donor's estate, and the statute is directed to preventing the avoidance of tax by such withdrawals. Further, if the latter value were taken for the purposes of estate duty, the donee would know that he would be charged with tax on that value, and no more, if the donor died within five years, and he could make provision for that event. As matters stand it would appear that the donee may receive a gift (e.g.) of shares or chattels worth £5,000, sell the property for £5,000, and 4½ years later be charged with duty on a much larger sum, if the subject-matter of the gift has appreciated in value in the meantime. However, your Lordships have to interpret the statute as it stands, and in the present case no difficulties can arise, on any view, as to the method of valuation of the "property taken." This being so, I shall make no observations, which would necessarily be obiter, on the difficult questions as to valuation which may arise in other cases hereafter.

I would allow the appeal.

LORD MACDERMOTT. My Lords, the relevant statutory provisions have already been read and I need not repeat them. When property is made subject to estate duty by reason of these provisions the assessment of the duty necessitates (i) the ascertainment of the property "taken" under the disposition purporting to operate as an immediate gift, whether outright or by way of settlement, and (ii) the valuation of the property as at the subsequent death of the person making the disposition. The question for determination in this appeal arises under (i) rather than under (ii), but the interval of time between the disposition and the death explains the dispute, as the amount of duty payable will be much greater if what happened during this interval respecting what was "taken" under the disposition is a relevant consideration. Thus, if the property "taken" under the disposition was the £5,000 given by the truster to the

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trustees and nothing else, the duty will be payable on that sum; but if, on the other hand, the property "taken" was something which at the date of the truster's death was the Creamola shareholding acquired with the £5,000, then the duty will be payable on £9,250, the value of that shareholding at that time.

My Lords, I see no escape from the conclusion that the trustees took the sum of £5,000 under a disposition made by the truster. That is what passed from the truster to the trustees and that is what the truster himself describes in the trust deed as the trust fund. So far, there seems little room for contention. It is true that the application for the allotment of the Creamola shares was made in anticipation of the truster's payment and that that payment and the trustees' payment for the shares they had applied for were both made on the same day. But there is nothing in what was thus done so expeditiously to belie the terms of the trust deed, and it seems to me that the position is in all material respects exactly the same as it would have been had the trustees held the £5,000 for a longer period, say a month, before investing as they did. But was the property "taken" under the disposition the £5,000 and nothing else? That raises the real issue. The trustees contend for an affirmative answer to this question. The Crown submits that the property "taken" was something essentially different from the £5,000; that it was a fund with an identity which continued and persisted throughout the duration of the trust and despite any change of investment, and that, as such, it was represented as truly by the Creamola shares as it had been by the money with which they were acquired.

Now, in instances of the sort under consideration, in which one has to look both to the beginning and the end of the interval I have mentioned, it seems to me that a definition of "property" which would enable a fund thus settled to be followed from mutation to mutation so that its form at any given moment became the property "taken" under the settlement, would be in no way repugnant to the general scheme and policy of the enactments relating to estate duty. The conception underlying such a definition finds expression in the definition of "settled property" in section 22 (1) (h) of the Finance Act, 1894, and is in my judgment quite compatible with the doctrine respecting an out and out gift as enunciated by Lord Sands in *Strathcona*.⁷ I think there would be nothing irrational or inconsistent in treating absolute gifts and gifts in trust differently in

⁷ 1929 S.C. 800, 808.

this connexion. In both cases a portion of the donor's estate is permanently alienated, but in one it is liberated so as to make its future traceability a mere matter of chance, while in the other the donor has himself done what he can to ensure traceability while the trusts he has declared endure.

In the circumstances of this appeal, however, the Crown is unable to call in aid any statutory definition. The relevant enactments do not use the expression "settled property," and the terms of the extended meaning given to "property" by section 22 (1) (f) of the Act of 1894 are not wide enough to comprehend the investments purchased by a settled sum of money which is not the proceeds of a sale. Whether they would have been wide enough to apply had the truster transferred, say, £5,000 War Loan instead of £5,000 is another question, but as it does not arise on the facts of this case I do not express an opinion upon it. As matters stand the Crown did not seek to apply these definitions; nor did it seek to found its case on the view expressed by Clauson L.J. in the Court of Appeal in *In re Payne's Declaration*,⁸ a view which, if I may respectfully say so, places more weight on the provisions of section 39 of the Customs and Inland Revenue Act, 1881, than those provisions are capable of bearing. In its substance the case for the Crown rested on the validity of the submission already mentioned, namely, that the "property taken" was a trust fund, a species of property in itself, distinct from, while yet embracing, such property as might from time to time be subject to the trust.

This conception of a trust fund as a continuing entity and a distinct form of property was advanced by the Crown in *In re Payne's Declaration*⁹ and was accepted by Simonds J., who described it in the following passage from his judgment: "It is to be observed that the disposition may be by way of gift outright or by way of settlement. It is the latter class of case with which I have to deal, and I think that it is the easier class of case. Where there is a settlement which persists to the date of death, it is not, I think, difficult to regard the trust property, in whatever state it may be at the death, as the same property as that which was taken under the disposition. The claim was thus formulated on behalf of the Attorney-General—namely, that the subject-matter of the gift is in each case the settled fund—that is, in this case the property originally made subject to the declaration of trust,

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“subject to and with the benefit of the duties and powers
 “invested in the trustees by the trust, including the power of
 “investing money and varying investments, and that the settled
 “fund as it actually existed at the death of the settlor is, there-
 “fore, the property deemed to be included in the property
 “passing on death, and the valuation as at the date of death
 “should relate to the investments and moneys representing the
 “corpus of the trust fund at that date.” In the Court of
 Appeal, Scott L.J. appeared to agree with that view. He said ¹⁰
 that “the property so given was simply the totality of equitable
 “rights created by that declaration of trust in the beneficiaries
 “under it,” and later ¹¹ that “it is the settled fund, with its
 “continuing although changing character under the investment
 “trusts of the settlement, which constitutes the property
 “charged with estate duty at the time when it passes or is
 “deemed to pass.” But perhaps nowhere was the Crown’s
 contention put more clearly than by Lord Patrick when, in the
 course of his opinion in this case, he said ¹²: “The property
 “taken is a trust fund, which from the moment of its creation
 “has certain inherent characteristics imposed in part by the
 “deed of trust and in part by the common law, and as such an
 “entity it continues thereafter. It is the trust fund, in what-
 “ever form it may then happen to be, which falls to be valued
 “at the time of the death of the donor.”

My Lords, a conception which has gained this degree of
 judicial support cannot be disregarded lightly. But I must
 confess that the more I reflect upon it the more difficulty I have
 in seeing how it satisfies the first essential requirement of the
 statute. Is a trust fund, considered in the sense of this concep-
 tion, “property” as that expression is used in section 2 of the
 Act of 1894? In my opinion, it is not. In the first place, such
 an abstraction does not seem to me to be “property” according
 to the ordinary meaning of the word, and there is no enactment
 to make that meaning inapplicable in this case. Secondly, the
 Act of 1894 does not appear to recognize any relevant distinction,
 as respects property which is subject to duty, between a trust
 fund and the items which happen to constitute it at any par-
 ticular moment. Thus in section 1 of the Act of 1894 the duty
 is made payable on “property . . . settled or not settled, which
 “passes on the death,” a provision which suggests that the
 creation of a trust fund was not regarded as producing a new

¹⁰ [1940] Ch. 576, 589.¹² 1953 S.C. 66, 85.¹¹ Ibid. 591.

species of property. And thirdly, the conception, if it connotes nothing more than the property for the time being subject to the trust, has all the appearance of an attempt to harness the definition of "settled property" which is, admittedly, inapplicable; while if, in addition, it connotes the rights and obligations arising by virtue of the trust, then, as it seems to me, it necessarily involves consideration of the interests and rights of the beneficiaries; and that is an element which, as I understand the decisions of this House in *Earl Cowley v. Inland Revenue Commissioners*¹³ and *Christie v. Lord Advocate*,¹⁴ ought not to be taken into account. What passes or is deemed to pass is the property settled and not the rights or obligations attached thereto by the settlor for the purposes of the trust.

For these reasons my conclusion is that the submission of the Crown fails. That being so it follows, in my opinion, that the "property taken" was the property taken immediately under the disposition, the sum of £5,000 and no more, for on this view of the Crown case nothing remains to justify looking beyond that sum to the state of its investment at the time of the truster's death. I would, therefore, allow the appeal.

LORD REID. My Lords, by section 2 of the Finance Act, 1894, property passing on the death of the deceased is deemed to include, inter alia, property which would require to be included in an account under sections of earlier Acts if those sections were enacted in the 1894 Act and were amended in certain respects. Those sections are section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889, and the effect of this legislation by reference, so far as it concerns the present case, is that property passing on death is by the 1894 Act deemed to include any property taken under a disposition, made by any person dying on or after June 1, 1881, purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been bona fide made twelve months before the death of the deceased. By later legislation this period of twelve months has been extended to five years but otherwise no change has been made.

It is not disputed that, in the ordinary case where a gift is made by transfer or delivery direct to the donee, the property

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taken is the same as the property given: it is the property which by virtue of the disposition ceases to belong to the donor. If the donor hands over money that money is the property taken, and if the donor transfers shares those shares are the property taken. But it has been held in this case by the Second Division, following the decision of the Court of Appeal in *In re Payne's Declaration*,¹⁵ that that is not so where the gift is to trustees to hold for beneficiaries: in that case the property taken is said to be something different from the property which has ceased to belong to the donor.

Section 7 (5) of the Finance Act, 1894, provides that the value of any property shall be estimated to be the price which in the opinion of the Commissioners such property would fetch if sold in the open market at the time of the death of the deceased. If the shares then constituting the trust fund were held to be the "property taken" in this case then the value of the gift for estate duty purposes would be £9,250.

The case of a gift direct to a donee was considered in *Lord Strathcona v. Inland Revenue*.¹⁶ At that time gifts within three years of the donor's death were deemed to pass on his death, and Lady Strathcona died within three years of making gifts to each of her four children. In each case the gift took the form of a transfer of war loan, shares of the Anglo-Persian Oil Co. Ltd. and stock of the Canadian Pacific Railway Co., and the property taken was held to be these securities. Lord Blackburn dissented, holding that the subject of the gifts was really cash. One of the donees had sold part of the securities given to him before Lady Strathcona's death, but it was held in his case that this made no difference and that the value of each gift for estate duty purposes was the value at the date of Lady Strathcona's death of the whole securities which she had transferred to the donees. Different reasons were given by the Lord President and Lord Sands, but on the particular facts they led to the same result.

The Lord President's view¹⁷ was that what is "deemed to be included in the property passing on the death of the deceased is the identical subject of the former gift, just as it was at the date of the gift—and nothing other, nor more, nor less. It is therefore that subject—as it was when taken by the donee—which must, in my view, be deemed (contrary of course both to fact and to possibility) to be included in the property which actually passes on the donor's death." If the

¹⁵ [1940] Ch. 576.¹⁷ Ibid. 805.¹⁶ 1929 S.C. 800.

subject of the gift was a promising young race-horse and before the death of the donor it had proved worthless or died, the Lord President thought that the Act required the Commissioners to ascertain what would be the value at the date of death of an equally promising young race-horse and not to ascertain the value at that date of the horse which had in fact been given.

Lord Sands was of a different opinion. He said ¹⁸: "The keys to the interpretation of that legislation are the ideas of property passing, and of property being deemed to pass although it does not actually pass. These ideas have been the subject of much judicial exposition and are now familiar, so I do not dwell upon them. It is enough that property which is deemed to pass upon death is upon the same footing as regards liability for estate duty as property which actually passes. . . . The theory underlying a Revenue Act must bow to its express provisions, but an appreciation of the theory may sometimes help to elucidation. It appears to me that the theory of the provisions here in question was, just as in the case of the 1881 Act, that, in order to avoid disappointment of the estate duty, the property donated should be treated just as if no donation had been made, and the property in question had remained part of the deceased's estate and had actually passed upon his decease." This passage was quoted with approval by the Privy Council in *Attorney-General for Ontario v. National Trust Co. Ltd.*¹⁹

The grounds of judgment of the Court of Appeal in *Attorney-General v. De Prévillé*²⁰ appear to me to be to the same effect. It was held in that case that where a tenant for life released his life interest in favour of the remainderman and died within twelve months of that release, no duty was payable in respect of that gift. A. L. Smith L.J. said ²¹: "Considering that the group of sections in the Act of 1881 is dealing with the property of which deceased persons in fact die possessed, or would have died possessed if they had not given it away, in my opinion it is not the true reading of section 38 that property must be brought into an account no matter whether it would or would not have had to be brought into an account if it had not been given away within twelve months of the death. It is only to be brought into account if it would have had to be so brought but for the gift"; and Vaughan Williams L.J.

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¹⁸ 1929 S.C. 807.¹⁹ [1931] A.C. 818, 822.²⁰ [1900] 1 Q.B. 223; 16 T.L.R.

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²¹ [1900] 1 Q.B. 223, 229.

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said ²²: "Section 38 deals with what shall be included, and says "in effect that it shall include not only property forming part "of the estate and effects of the deceased at his death, but also "property which he has parted with within three (now twelve) "months before his death. Now, must not this mean, according "to the ordinary rules of construction, property of the same kind "as that dealt with in the antecedent legislation? That is to "say, property in which the deceased had such an interest that, "if he had not parted with it by a gift within twelve months "before his death, it would have been estate and effects of a "deceased, and therefore have been included in the property on "the value of which the duty was granted." That reasoning appears to me to cover the case of the racehorse discussed in *Lord Strathcona v. Inland Revenue* ²³ and to lead to the conclusion that if the racehorse had predeceased the donor no duty would be payable in respect of the gift.

I now turn to consider whether there is room for a different approach when the property is given in trust. One possible view is that one must look to see not what passed from the donor to the trustees but what was the property taken by the beneficiaries, they being the only donees. Another possible view which has been expressed is, if I understand it rightly, that one does look to see what is the property taken by the trustees but that what the trustees take is not the same as what the donor gave; the trustees take in a fiduciary capacity and the rights which they take are different from those which the donor had. What they hold is a trust fund which is a continuing entity or corpus. These and other interpretations were discussed in *In re Payne's Declaration*.²⁴ The facts in that case were involved, but those parts of the judgments which it is necessary to consider do not depend on particular specialities and I think that it is enough to say that the settlor in effect conveyed to the trustees £10,000 and an option. The trustees exercised the option and bought shares; then there were changes of investments and receipts of bonus shares, and when the settlor died less than three years later the trust fund was worth about £50,000.

In the Court of Appeal all the Lords Justices held that duty was payable on the value of the fund at the settlor's death, but all for different reasons. Scott L.J. said ²⁵: "The real, and in "my opinion the only, issue on the first question is whether the "property given by the settlor and 'taken' by the donees is in

²² [1900] 1 Q.B. 231.²³ 1929 S.C. 800.²⁴ [1940] Ch. 576.²⁵ Ibid. 589.

“law to be regarded, as the appellants contend, as being a cheque
 “for £10,000 (that is to say, a gift to the trustees equivalent to
 “that sum in cash), or, as the revenue contend, as the totality
 “of the equitable interests conferred by the declaration of settle-
 “ment on the beneficiaries, covering the whole value of the settled
 “fund and entitling them to have that fund administered as a
 “single continuing corpus for their benefit in accordance with
 “the trusts of the settlement.” Scott L.J. then said that in his
 view the property given “was simply the totality of equitable
 “rights created by that declaration of trust in the beneficiaries”;
 no other form or kind of property was the real subject of the gift;
 the transfer to the trustees of the legal title was mere machinery
 to effect the gift. I find that view at first sight simple and
 attractive, but for several reasons I cannot agree with it. In the
 first place, duty is, in general, payable on the passing of property
 and not on the creation of beneficial interests in it, and where
 something other than passing of property, e.g., the cesser of an
 interest, is to attract liability, that is expressly stated. And
 then I do not see how to deal on this theory with a case where
 some of the beneficial interests do not vest immediately. The Act
 is dealing with dispositions purporting to operate as immediate
 gifts. If the trustees are directed, say, to hold for A in *liferent*
 and on A’s death to convey to X, whom failing, to Y, there is no
 vesting of the fee until A’s death and therefore no immediate gift
 to anyone of the beneficial interest in the fee. Let me suppose
 that the funds were conveyed to the trustees more than five years
 before the donor’s death: if all the beneficial interests immediately
 vested there could be no liability to duty, but suppose the fee did
 not vest until the death of the *liferenter* and that took place before
 but within five years of the death of the donor. Is it to be said
 that because there was no vesting of the fee until within the five
 years therefore there was no gift to the *fiar* until within the five
 years and therefore duty is payable? But that would seem to
 be the result if one has to look at the taking of beneficial interests
 by the beneficiaries. Later in his judgment Scott L.J. seemed to
 modify his view because he said ²⁶: “But it is the settled fund,
 “with its continuing although changing character under the
 “investment trusts of the settlement, which constitutes the
 “property charged with estate duty at the time when it passes
 “or is deemed to pass.” That appears to me to be quite a
 different conception, and I shall examine it later.

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²⁶ [1940] Ch. 591.

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Clauson L.J. put his judgment on a ground which it seems to me could be applied equally well to a direct gift to a donee, and would then lead to the conclusion that, where such a donee has sold the subject of the gift and reinvested the proceeds, he also is chargeable on what is in his hands at the donor's death and not on what he received from the donor but no longer holds. This would be contrary to the decision in *Lord Strathcona v. Inland Revenue* ²⁷ and I think contrary to the terms of the Act. The ground of judgment of Clauson L.J. was not supported by the respondent in argument, and I do not think it necessary to say more than that I do not agree with it.

Luxmoore L.J. held that the gift was not a gift of £10,000 but was a gift of certain patent rights which on realization yielded £10,000 to the trustees. Then, having referred to section 22 (1) (b) of the Act of 1894, he said that it was admitted that if the property taken was the patents and patent rights, then estate duty was exigible on the value of the investments for the time being representing that property. I have found no other reference in the report to any such admission and if it was made I do not think that it was rightly made. Section 22 is the definition section and subsection (1) provides: "In this part of this Act, 'unless the context otherwise requires . . . (f) the expression 'property' includes real property and personal property and 'the proceeds of sale thereof respectively and any money or 'investment for the time being representing the proceeds of 'sale.'" The provision is not a definition of "property"; it only provides that "property" is to have an extended meaning and include "proceeds of sale," etc., unless the context otherwise requires. It is readily applicable where the Act is dealing with the holding of property for a period, but it appears to me to be inapplicable where the Act is dealing with property to be ascertained at a particular moment of time. If one is looking for property passing or taken at a particular time, the proceeds of a subsequent sale cannot have passed or been taken at that time because they did not then exist. I therefore think that this provision is excluded by the context here; but if I am wrong about that and this provision is applicable, it leads to a strange result; it can only apply where there are "proceeds of sale" of the original property and there can be no proceeds of sale of money. So this provision would bring in investments held for the time being if the original gift was something other than money but

²⁷ 1929 S.C. 800.

would not bring them in if the original gift had been money. This is so unreasonable that it may afford an additional reason for holding the provision inapplicable to this kind of case and, further, if it were applicable, I do not see anything which would exclude it where the original property was taken by an individual donee. That would mean that if he sold the original gift to him and reinvested the proceeds he also would only be liable in respect of the value of the investment held by him when the donor died. But it is, I think, settled law that an individual donee's liability is not altered by reason of his having sold the original gift before the donor's death; his liability must still be calculated with reference to the value of the original gift.

The Court of Appeal affirmed the judgment of Simonds J.²⁸ Simonds J., having said that it was clear that what the settlor settled was £10,000 and the option, and that it was also clear that the only relevant date for the purpose of valuing property which passes is the date of death, proceeded²⁹: "The question of difficulty on which the parties are at issue is what is the property of which the value has to be ascertained at the death of the deceased. The contention of the Attorney-General has already been stated: the property which passes on the death was the trust fund as it then existed. The plaintiffs, on the other hand, say it is essential to see what was on January 26, 1936, taken under the disposition made on that date; it was the sum of £10,000 and an option, and it is that property so taken which must be valued at the death. Each side points to the hardships and anomalies which the other view involves." Then, having mentioned some of these hardships and anomalies, he said³⁰: "The real problem is to reconcile the two elements: (a) property taken under a disposition made in (say) 1936, and (b) a valuation to be made in (say) 1939." If one were legislating that might well be said to be the real problem, but we must take the Act as we find it, and the Act appears to me to set two quite distinct problems, the first of which must be solved before one reaches the second. The first is to determine what was the property taken, and, once that problem has been solved, the next is how to value that property. No doubt if the Act is ambiguous so as to leave open two methods of determining what was the property taken, then, if one method leads to a fairer result than the other when one comes to apply the direction of the Act as to valuation, that fact should be taken into account

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²⁸ [1939] Ch. 865.³⁰ Ibid. 874.²⁹ Ibid. 873.

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I would agree that, if the statutory provisions can be so construed, it would be better that duty should be payable on the value of the investments held at the date of death of the donor than that it should be payable on the value of other investments originally held but later sold. In the present case the investment acquired by the trustees appreciated, but in other cases it may have depreciated and then duty would have to be paid on a greater sum than the value of the trust fund when the liability arises; it would be more just that duty should be paid on the value of the investments out of which it must be paid. But I am unable to follow Simonds J. in finding it possible to construe the Act so as to lead to the result. He said³¹: "Where there is a settlement which persists to the date of death, it is not, I think, difficult to regard the trust property, in whatever state it may be at the death, as the same property as that which was taken under the disposition." It is with regret that I find myself unable to regard, say, securities received from the donor and sold as the same property as other securities which have been bought with the proceeds of the sale of the first.

The grounds of decision of the majority of the Second Division in the present case are perhaps most concisely stated by Lord Patrick in the following passage from his opinion³²: "I cannot regard the property taken under an immediate out-and-out gift as being the same as the property taken under a deed of trust for the benefit of limited interests. Nor does the kind of object transferred affect the question: whether it is cash, or securities, or the rest. Let us suppose a person who owns £5,000 in cash. His rights in it are absolute. He can do what he likes with it. In particular, he can dispose of it inter vivos. If by an inter vivos transfer he conveys the £5,000 absolutely among various donees, the property taken is just what the donor had a moment before the transfer. It is £5,000 in absolute property. But, if he transfers the £5,000 under an inter vivos deed of trust for the benefit of various donees in limited interest, the property taken is something very different from what the donor had a moment before the transfer. No person and no agglomeration of persons now has the absolute right which he had to the £5,000. He has extinguished that right and created something new." It is true that no person

³¹ [1939] Ch. 875.

³² 1953 S.C. 66, 84.

and no agglomeration of persons now has the absolute right which the donor had to deal with the £5,000. But, in my opinion, that does not mean that the rights of property in the £5,000 were diminished or altered. A thing given may pass from the donor to the trustees, and then they may sell it. The buyer will have an absolute right just as the donor had, but the trustees could not give to the buyer greater rights of property than they had themselves. The rights of property remain the same throughout, but while the thing is owned by the trustees their power to exercise those rights is limited.

I would express my conclusion in this way. The donor had certain rights of property. Either those rights must be taken or some other rights. Unless what is taken is the rights which the donor had, what has happened to the donor's rights? They have not disappeared. If, for example, trustees take a secured debt on behalf of beneficiaries, the trustees have the same rights against the debtor and the security as the donor had. *What has happened is not that the property has changed, but that, by reason of their fiduciary position and of the directions of the truster, the trustees do not have the same freedom to deal with the property as the truster had: they are obliged to use the rights of property which have come to them in certain ways and precluded from using them in other ways, but the property remains the same. I agree with the opinions of Lord Sands in *Lord Strathcona v. Inland Revenue*³³ and A. L. Smith and Vaughan Williams L.JJ. in *Attorney-General v. De Préville*.³⁴ A gift is taxed on the footing that if the property given away had not been given the donor would still have had it at his death. Of course, he might have sold the property and spent the proceeds; but no one suggests that that can be considered. Or he might have sold the property and re-invested the proceeds: where the gift is to an individual donee no one has suggested that that can be considered. The re-investment cannot be deemed to have been in the donor's possession and to have passed on his death. I cannot see how there can be any difference where property is conveyed to trustees unless in that case the whole basis of liability is different. The argument was that in all cases other than those where there is a declaration of trust it can be said that property which in fact passed at an earlier date is deemed to have passed at the donor's death, but that this cannot be said where a donor simply makes a declaration

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³³ 1929 S.C. 800.³⁴ [1900] 1 Q.B. 223.

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of trust with himself as the sole trustee. In that case, it is argued, no property actually passes when the gift is made and the "property taken" must be the rights conferred on and taken by the beneficiaries under the declaration of trust. But that view only leads to another difficulty. If the terms of the declaration are such that there is no immediate vesting of the fee, then on that view I do not see how there can be any immediate gift of the fee because there cannot be a gift until there is someone to take it. What happens in such a case is that, although the title to the property is still held by the donor, the property ceases to belong to him, and all beneficial rights of property pass away from the donor as an individual to himself as trustee. I think that that can be regarded as a real passing of property and therefore the analysis which is valid in the ordinary case is still valid in this case. The statutory provision ties together gifts by way of transfer or delivery, and gifts by way of declaration of trust so closely that I would only accept the view that the basis of liability is quite different in the last case if that were really necessary, and I see no such necessity.

It remains to consider, in the light of the conclusions which I have already reached, what was the property taken in this case. Was it the £5,000 or was it the shares? One can figure a case where the donor hands over money with instructions to buy a particular investment with it and the taker is obliged to follow those instructions. In such a case it might be said that the real subject of the gift is that investment. But I see nothing of that kind in the present case. Under the deed of trust the trustees had full discretion as to the investment of the £5,000 and there is nothing to show that the decision to invest it in these particular shares was not their decision. I am therefore of opinion that the property taken was the sum of £5,000, that duty is payable on that sum, and therefore that the appeal should be allowed.

LORD KEITH OF AVONHOLM. My Lords, section 2 (1) of the Finance Act, 1894, provides, inter alia, that property passing on the death of the deceased shall be deemed to include property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889, and with certain other amendments made by the Finance Act, 1894. Among property to be so included in an account under the section as amended is "any

“ property . . . taken under a voluntary disposition, made by any person . . . purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been bona fide made twelve months before the death of the deceased.” By subsequent legislation five years now falls to be substituted for twelve months.

In the circumstances of this case three related questions arise: What property was taken? Under what disposition? And in whose favour did the disposition purport to operate as an immediate gift inter vivos? The answers depend, in my opinion, on determining what was the disposition. I have reached the conclusion that the disposition here is the trust deed. I recognize that a disposition within the meaning of the statute need not involve a deed at all. It may be a simple act of delivery of a corporeal movable. A possible view could be that the disposition here was the cheque for £5,000 operating as an assignment of that amount to the trustees when presented to the drawer’s bankers. For reasons which I shall state in a moment I reject that view, and, indeed, the arguments addressed to this House by both sides in the case proceeded, I think, on the view that the disposition was the trust deed.

Looking for a moment at the trust deed, I find that it opens with a statement by the truster that for certain reasons which I need not enumerate he has resolved “ to make a provision “ for ” his daughter Elizabeth “ in manner aftermentioned.” He accordingly creates a trust by appointing various persons as trustees “ for the ends, uses and purposes aftermentioned ” and provides and declares “ that the trust fund consists of the sum “ of £5,000 sterling which is vested in the trustees and which, “ or investments representing the same, shall be held and applied “ for the trust purposes afterwritten.” The deed is dated December 19, 1946. The sum of £5,000 was paid by the truster on December 24 by cheque drawn in favour of the law agents to the trust, who had already, on December 21, applied for an allotment of 5,000 new £1 ordinary shares of Creamola (England) Ld. at par.

The provision which was made through the medium of this trust for Elizabeth took the form of an alimentary liferent of the net income “ of the trust fund ” subject to a power in the trustees to withhold the full net income from time to time as they might consider advisable and to form a reserve fund or to accumulate with capital any unexpended portion of income all under certain declarations and conditions. The trustees were also given power

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to encroach on capital on her behalf to an extent not exceeding one-fourth " of the trust fund." On her death " the trust fund " was to go to lawful issue surviving her. There are destinations over in the event of Elizabeth dying without leaving lawful issue surviving in favour of her sister Jane or her issue, whom all failing in favour of the truster's heirs in mobilibus.

I find little difficulty in holding that by this provision for Elizabeth the truster made an immediate gift to her qualified by the powers vested in the trustees. I think that he may also be said to have made an immediate gift in favour of other interests although these were at the time unascertained or contingent. The gift would not fail because in the last resort the truster's heirs in mobilibus would take and in the meantime the trustees would hold for the interests that would emerge. I see no difficulty in making an immediate gift for someone who is to be ascertained in a particular way at a future date so long as the donor parts with the subject of gift to a stakeholder or other person to hold for the prospective donee. The outlook of the statute, in my opinion, is merely to see whether someone has disposed of his property gratuitously during life. He could do so in two ways, by *donatio mortis causa*, which is revocable, or by an out and out gift, which is irrevocable. Here the truster made an irrevocable and gratuitous disposition of property during his life. If it was gratuitous someone got a gift and, in my view, the donees here were the beneficiaries under the trust deed. They took, or the trustees took for them, but whoever took did so, in my opinion, under the trust deed. The mere passing of the cheque, as I see it, did not operate as a gift. If it did the trustees could have put the proceeds in their pockets. The passing of the cheque was purely executorial, a piece of machinery to satisfy a trust which had already been declared.

I find confirmation for the view I have taken in the reference in section 38 (2) (a) to disposition by way of declaration of trust. This would clearly apply to money or property belonging to a person which that person declared that he held in trust for someone whom he wished to benefit. There would be no transfer or delivery of property, but the donee would take under the declaration of trust which, as I read the statute, would be the disposition. In substance I see no difference between such a case and a trust declared by a donor to exist over property conveyed by the donor to persons nominated by him as trustees. The machinery may be different but in each case the donees take under a declaration of trust. I find further support for my view in the language of

section 39 of the 1881 Act. This section runs: "Every person
 " who as beneficiary, trustee, or otherwise, acquires possession, or
 " assumes the management, of any personal or movable property
 " of a description to be included in an account according to the
 " preceding section shall upon retaining the same for his own use,
 " or distributing or disposing thereof, and in any case within six
 " calendar months after the death of the deceased deliver to the
 " Commissioners of Inland Revenue a full and true account,
 " verified by oath, of such property duly stamped as required by
 " this Act. Any officer authorized by the Commissioners for the
 " purpose may administer the oath." It is clear that a person
 " retaining the same for his own use " must be a donee under
 the disposition referred to in the preceding section. A person
 " distributing or disposing thereof " will include, but is not neces-
 sarily confined to, a trustee of property gifted under the preceding
 section. When a trustee distributes or disposes of property he
 distributes or disposes of it, in my opinion, under the deed or
 disposition by which the property was taken, and in this case the
 trustees distribute or dispose of the property under the trust deed.

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I reach the conclusion, accordingly, that the disposition here
 was the trust deed and that it operated as an immediate gift
 inter vivos to the beneficiaries. There remains the question:
 what property was taken under the disposition? In my opinion,
 it was the corpus of the trust estate whatever that might be
 from time to time. I can see no other answer to the question.
 The statute speaks of a disposition purporting to operate as an
 immediate gift. The gift operated by the trust deed is a life interest
 and fee to certain ascertained or ultimately ascertainable persons.
 That cannot, as the Lord Justice-Clerk said, be a gift of a talent
 to be buried. It is a gift that can only be made effective by
 investment and due administration of trust property. It is said
 that the subject of gift must be the same from the giver's end
 and from the taker's end. I agree. But I see the gift as the
 creation of a trust of property at the giver's end and the receiving
 of the benefits of the trust at the taker's end. When I assign
 gratuitously a policy of life insurance payable at my death I give
 the donee a right to claim from the insurance company the insur-
 ance moneys payable at my death. The value of the policy is
 not the same at the date of gift as it will be at the death and it
 may include profits which have not been declared when the gift is
 made. When I create a trust I create a right in the beneficiaries
 to claim against the trustees the payments or benefits due under
 the trust and to require of them due administration of the trust.

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The property taxed, of course, is the amount of the assurance moneys or the value of the trust property from which the beneficiaries' claims present or future fall to be satisfied, not the value of the beneficial interests. There are obvious differences between these two cases and I do not wish to press the analogy too far, but a disposition, whether assigning or creating a right of action against a third party, is, I think, a disposition of property coming under section 38 (2) (a) if operating as an immediate gift inter vivos.

A cogent consideration which seems to me to be almost conclusive is the language of section 39 of the Act of 1881 to which I have already referred. The duty of delivering an account falls upon every person mentioned under that section in respect of property covered by section 38 "upon retaining the same for "his own use, or distributing or disposing thereof, and in any "case within six calendar months after the death of the "deceased." Trustees do not retain anything for their own use, and I read these words as referring naturally to an individual donee, though the duty could hardly arise until the death of the deceased. But the words "distributing or disposing thereof" are very apt to cover a trustee distributing trust property among beneficiaries. In the present case, if Elizabeth had died without issue surviving, the trustees would have had to distribute the trust estate to her sister Jane, whom failing, Jane's issue, whom failing, the truster's heirs in mobilibus. This duty might have arisen before the truster's death, if Elizabeth had died then. And what the trustees would have distributed would have been the corpus of the trust as it then existed. I do not see how in any true sense that can be said to be distributing the £5,000 of which the trustees took the possession or management some years before, and what section 39 is referring to is "property of "a description to be included in an account according to the "preceding section." The language of the statute appears to me to be satisfied only by treating property put in trust, not according to its original character but according to the character it had assumed by the time it fell to be distributed, or at the truster's death, whichever is the earlier. This, I think, is the line of reasoning which appealed to Clauson L.J. in *In re Payne's Declaration*,³⁵ although I do not follow him with regard to the effect of the word "taken." I regard "taken" as referring to taken by the beneficiaries, and my reliance on section 39 has

³⁵ [1940] Ch. 576.

reference to the meaning to be attached to the word "property." I do not regard this point as an independent and separable ratio of decision, but rather as a consideration supporting the view I have already expressed as to the meaning of property in section 38 when taken under a declaration of trust operating as an immediate gift inter vivos. Substantially I take the same view as that expressed by Simonds J. and Scott L.J. in *In re Payne's Declaration*³⁵ and in the opinions of the majority of the judges in the Court of Session in the present case. In my view sections 38 (2) (a) and 39, taken as a whole and fairly read, lead to the conclusion that property in the case of gift by an inter vivos trust means not the sum or property initially put into trust but the corpus of the trust estate as it may exist at the death.

The principle underlying section 38 (2) (a) is very clear. It is to prevent a person avoiding death duty on some part of his estate by giving it away within a stated period of his death. I agree with Lord Sands in *Lord Strathcona v. Inland Revenue*³⁶ that we are to assume that the deceased has in fact retained the property given away until his death and have to value it as at that date. We must, I think, follow out the fortunes of the subject of gift so far as these are due to the nature of the subject. So if a subject is capable of growth or improvement or decay or death in the natural course of things, we should allow for these in the period between the date of gift and the date of death. I say this having in mind the racehorse used as an illustration in the *Strathcona* case.³⁶ If the racehorse died in the years after it was gifted and before the donor's death, I would, as at present advised, say that it would not fall to be valued at all at the donor's death, because if he had kept it instead of giving it away we must assume, I think, that it would still have died, in which case it could not appear in the estate passing at the donor's death. In the same way, if it had become better, or worse, because of the additional years it had attained since the date of gift, it should be valued as at the death accordingly. Lord Sands' view is, in my view, more logical and more consistent with the object of the statute than Lord President Clyde's conception of assuming a horse in the state and condition and with the prospects that the actual horse had at the date of gift and valuing such a horse at the date of death. Difficult questions might arise where the horse had been realized

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for cash before the date of the donor's death. But it is unnecessary to follow these out here or to consider whether they would be solved by the definition of property in section 22 of the Finance Act, 1894. I venture into this excursion not because the *Strathcona* case³⁶ is in point here but because the considerations to which I have adverted and the principle enunciated by Lord Sands have, I think, a certain bearing on this case. Trust property has the potentiality of appreciating or depreciating with age and the state of investment, and this applies whether the property with which the trust starts is cash or securities or any other kind of property. If this property with its potentialities and incidents be assumed to have been retained and administered in the hands of or for the truster, as it was in the hands of the trustees, it would have borne duty in the state in which it was at his death. It seems entirely consistent with the policy and conception of the statute to say that that is how property gifted under a trust, whether cash or other, should be treated and valued at the donor's death.

Various anomalies were referred to by Mr. Stamp as arising under the provisions of various of the Finance Acts if settled property were treated as something different from the cash with which such settled property may have originated. Such anomalies would give rise, he said, to what would seem to be double taxation of what is substantially the same property. That is no doubt an important consideration, but I have not found it necessary to consider whether these anomalies would arise or whether they could be resolved. The matter will have to await an actual case giving rise to such a question. Even if such anomalies will result, they will follow from the construction put upon section 38 (2) (a) by this House as applied to dispositions of property in trust. It is not, I think, permissible to control the construction of section 38 (2) (a) of the 1881 Act by conceptions as to settled property in later Finance Acts. The anomalies will result from different or conflicting conceptions in different statutory provisions. It may equally be pointed out that a construction that will treat the whole corpus of a trust fund as existing at the death as property taken under section 38 (2) (a) will in general result in a more equitable result to the beneficiaries who will have to suffer the duty than the construction contended for by the appellants. In many cases I imagine the trust assets of an inter vivos trust will show a serious

³⁶ 1929 S.C. 800.

depreciation in value as compared with the sum of money originally put in trust, and it will come hard on the beneficiaries to have estate duty assessed on a sum substantially higher than the value of the assets out of which it is to be paid. The statute must, however, be construed independently of such considerations. But for the reasons which I have endeavoured to state I think that the court below came to a sound decision. I would dismiss the appeal.

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Appeal allowed.

Solicitors: *Martin & Co. for Mackenzie & Black, W.S., Edinburgh, and Hill & Hoggan, Writers, Glasgow; Solicitor of Inland Revenue.*

DYAL SINGH	APPELLANT;	J. C.*
AND		
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ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

East Africa—Execution—Sale by bailiff—Title of purchaser—Motor-vehicle—Auction sale under court order—Previous registered chattels mortgage—Notice—Title of purchaser as against mortgagee—Chattels Transfer Ordinance (Laws of Kenya, 1948, c. 281), ss. 4, 13 (2)—Bankruptcy Ordinance (Laws of Kenya, 1948, c. 30), s. 45 (3)—Bankruptcy and Deeds of Arrangement Act, 1913 (3 & 4 Geo. 5, c. 34), s. 15.

Execution. Statute—Construction—Proviso—Must not be construed so as to nullify enactment—Bankruptcy and Deeds of Arrangement Act, 1913, s. 15. Bankruptcy—“Possession order or disposition”—Registered mortgage of chattels. Bill of sale.

By subsection (3) of section 45 of the Bankruptcy Ordinance, Laws of Kenya, 1948, c. 30, which is in substantially the same terms as section 15 of the (English) Bankruptcy and Deeds of Arrangement Act, 1913: “Where any goods in the possession of an execution-debtor at the time of seizure by a bailiff are sold by such bailiff “without any claim having been made to the same, the purchaser of “the goods so sold shall acquire a good title to such goods, and no “person shall be entitled to recover against such bailiff or any other “person lawfully acting under his authority, for any sale of such “goods or for paying over the proceeds thereof prior to the receipt “of a claim to such goods, unless it is proved that the person from

* *Present: LORD PORTER, LORD REID, LORD KEITH OF AVONHOLM.*

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“whom recovery is sought had notice, or might by making reasonable inquiry have ascertained that such goods were not the property of the execution-debtor: Provided that nothing in this subsection contained shall affect the right of any claimant, who may prove that at the time of sale he had a title to such goods, to any remedy to which he may be entitled against any person other than such bailiff.”

The above subsection—which applies whether or not any question of bankruptcy is involved—gives a good title to purchasers whether or not they had notice of the true position—that the goods were not the property of the execution-debtor—for the words “person from whom recovery is sought” relate back to “no person shall be entitled to recover against such bailiff or any other person lawfully acting under his authority,” and cannot on construction relate back to “the purchaser.”

The proviso to the subsection, if read by itself, would mean that the enactment in the preceding part of the subsection should not affect the right of the true owner to recover the goods or their value from the purchaser, and would completely contradict and nullify the enactment—which a proviso can only be held to do in the most exceptional circumstances. Here, the enactment stood, for it did not nullify the proviso, but merely limited its application, since there might be others besides the bailiff and the purchaser against whom the true owner had a remedy, and giving effect to the enactment with regard to the purchaser did not therefore entirely deprive the proviso of meaning.

Where, therefore, the appellant had purchased at a public auction sale held pursuant to a court order, without a claim having been made by anyone, a motor-vehicle, in respect of which the execution-debtor, from whose possession it was taken by the bailiff, had previously executed a chattels mortgage in favour of the respondents, of which, the instrument having been registered under the Chattels Transfer Ordinance, 1930, all persons were deemed to have had notice, the appellant secured a clear title as against the respondents.

Section 13 (2) of the Chattels Transfer Ordinance, 1930, which provides that “so long as an instrument continues to be registered hereunder, the chattels comprised in that instrument shall not be deemed to be in the possession, order or disposition of the grantor, within the meaning of the Bankruptcy Ordinance,” does not mean that for the purposes of all other provisions in the Bankruptcy Ordinance chattels comprised in an instrument shall be deemed not to be in the possession of the grantor; in particular, section 13 (2) does not limit the application of section 45 (3) of the Bankruptcy Ordinance.

Curtis v. Maloney [1951] 1 K.B. 736; 66 T.L.R. (Pt. 2) 869; [1950] 2 All E.R. 982 approved.

Judgment of the Court of Appeal for Eastern Africa reversed.

APPEAL (No. 12 of 1953) from a judgment of the Court of Appeal for Eastern Africa (April 10, 1952) affirming a judgment

of the Supreme Court of Kenya at Nairobi (June 14, 1951) on a case stated by the parties for the decision of the court.

The facts as stated in the case stated were as follows: One Njoroge, son of Daudi, owned a motor omnibus, and borrowed from the respondents a sum of Sh.3.600 on the security of that vehicle; on October 12, 1946, he gave to them a chattels mortgage which was duly registered in accordance with the provisions of the Chattels Transfer Ordinance, 1930. A creditor of Njoroge obtained judgment against him and execution followed with a sale by public auction of that vehicle by the court broker on February 3, 1948. The vehicle was purchased at that sale by the appellant for Sh.2.000. Thereafter the appellant spent about Sh.7.000 on the vehicle and obtained a passenger bus licence and operated the vehicle between Nairobi and Limuru. On April 29, 1950, the respondents seized the vehicle while it was in the possession of the appellant.

The question submitted to the court in the stated case was, "Has the plaintiff secured a clear title in respect of the said bus by virtue of his having purchased the same at a public auction carried out in pursuance of a court order in that behalf, or have the defendants any enforceable security against the said bus by virtue of the aforesaid chattels mortgage, having failed to lodge any objection proceedings before the sale."

The case was heard by Bourke J., who gave judgment holding that the appellant had not secured a clear title to the motor omnibus, and that the respondents retained their interest and rights in the vehicle under the instrument of mortgage. The Court of Appeal for Eastern Africa (Nihill P., Worley V.-P. and Thacker J.) dismissed the appeal of the appellant from that judgment.

The question in this appeal was whether on the sale of the motor omnibus the appellant acquired a clear title by virtue of section 45 (3) of the Bankruptcy Ordinance, Laws of Kenya, 1948, c. 30, or whether by virtue of section 4 of the Chattels Transfer Ordinance, Laws of Kenya, 1948, c. 281, which provided that "all persons shall be deemed to have notice of an instrument and of the contents thereof when and so soon as such instrument has been registered as provided by this Ordinance," the title of the appellant was subject to or defeated by the interest of the respondents under their chattels mortgage.

1954. Feb. 4, 8, 9. *Leonard Caplan* for the appellant. The first submission is that on a literal and grammatical reading of

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subsection (3) of section 45 of the Bankruptcy Ordinance the provisions therein with regard to notice do not relate to the person referred to as the purchaser. Secondly, when under any statute notice is material to affect a title given to the purchaser it is always expressly so stated in the Act: see section 22 of the Sale of Goods Act, 1893. The Board's decision on this matter will be a decision on the identical words of the English Act: Bankruptcy and Deeds of Arrangement Act, 1913, s. 15. The next question is whether the proviso to subsection (3) has the effect of nullifying the effect that the purchaser acquires a good title: it is submitted that it has not, and that *Curtis v. Maloney*¹ is not an authority against the appellant on the first point, because the reference in that case to a purchaser was not a matter which was under consideration and must be regarded as per incuriam. The original owner of the goods is entitled to sue for money against the execution-creditor (*Jones Brothers (Holloway) Ltd. v. Woodhouse*²) and it is for the preservation of that type of action that the proviso to subsection (3) of section 45 and to section 15 of the English Act is applicable. It is submitted that the section works justice all the way round if read as it is contended that it should be, but that it creates injustice if read otherwise. There are four consequences which follow from the appellant's contention. First, the bailiff and other officers are made aware by the section of what will follow upon a sale by them of property which they knew, or ought to have known, did not belong to the execution-debtor; and such bailiff or other officer is only liable if he sells the property with that notice or constructive notice. Secondly, the purchaser pays his money under an unequivocal statutory assurance that he will get a good title, and he does get a good title. Thirdly, the original owner can recover the proceeds of sale from the execution-creditor, and those proceeds of sale ought prima facie to be the real value of the goods, because they are sold with something which is even better than a warranty of title, they are sold with an absolute title. Fourthly, the execution-creditor gets nothing: he has to return the proceeds to the original owner; there is no injustice in that.

On the other hand, if the respondents' view is right, then, first, the original owner can recover the goods against the purchaser, it is true, but, secondly, the purchaser, even though he has only had this imputed notice—is deemed to have it—stands

¹ [1951] 1 K.B. 736, 741; 66 T.L.R. (Pt. 2) 869. ² [1923] 2 K.B. 117.

in this position, that he neither has the goods nor his money. He has had to surrender the goods to the original owner, and he cannot recover his money back on a consideration which has wholly failed because there is no warranty given on the sale: *Chapman v. Speller*.³ Thirdly, the bailiff with express notice goes scot free despite the wording of the section if the purchaser is sued by the original owner for the return of the chattel. Fourthly, the execution-creditor, even if he had express notice, retains the proceeds in the same circumstances—if the original owner chooses to go and seize the article—so that people who had express notice come off better than people who had constructive notice.

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By section 45 (3) a purchaser of goods thereunder is expressed to acquire, and does acquire, “a good title to such goods.” And the acquisition of a good title under the section is not, by the section or the Chattels Transfer Ordinance or otherwise, affected by any notice which the purchaser may be deemed to have under section 4 of the Chattels Transfer Ordinance. Only *Curtis v. Maloney*⁴ has been cited for two reasons: (i) because it is a decision on the very words of the section; and (ii) because it is not quite clear to what extent the respondents here are contending that *Curtis’* case⁴ was wrongly decided. If it was wrongly decided, then by virtue of the proviso a purchaser from a court bailiff acquires as against the original owner no title irrespective of whether he did or did not have notice. The respondents seem to base themselves entirely on the question of notice, and it has not therefore been necessary to cite authorities on the manner of construing a proviso in relation to the enactment part to which it is appended.

Gahan Q.C. and *J. G. Le Quesne*, for the respondents, referred to the decisions in *Crane & Sons v. Ormerod*⁵ and *Jelks v. Hayward*,⁶ which had made it necessary to give the bailiff and other officers further protection, and submitted that the matter now depended on the construction of subsection (3) of section 45. Section 13 (2) of the Chattels Transfer Ordinance provides that “so long as an instrument continues to be registered hereunder” “the chattels comprised in that instrument shall not be deemed” “to be in the possession or disposition of the grantor within the” “meaning of the Bankruptcy Ordinance,” and the first submission is that by reason of that provision these goods were not

³ (1850) 14 Q.B. 621.⁵ [1903] 2 K.B. 37.⁴ [1951] 1 K.B. 736; 66 T.L.R. (Pt. 2) 869.⁶ [1905] 2 K.B. 460; 21 T.L.R. 527

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in the possession of the execution-debtor at the time of seizure, and under subsection (3) of section 45 of the Bankruptcy Ordinance authority was limited to selling goods which were in the possession of the execution-debtor at the time of seizure. There was therefore no authority to sell.

Secondly, on the construction of subsection (3) of section 45, there must be goods in the possession of the execution-debtor—that is a condition precedent to the operation of the subsection. Then they must be sold without any claim having been made to them; and the purchaser of the goods so sold shall acquire a good title. The first part of the clause cannot be read as an authority to take goods which are not the property of the execution-debtor. The bailiff's authority is to take the goods of the execution-debtor, and the subsection is dealing with a case where he has, or may have, made a mistake; if he takes goods which did not belong to the execution-debtor, but which were in his possession, the section operates. But if the person who is described as the purchaser of the goods knew that the goods were not the property of the execution-debtor, then it is submitted that he would know that the bailiff was exceeding his authority—was acting outside the writ or instructions issued to him—and he would know that what purported to be a sale was not a proper sale because the seizure should not have been made, and the sale was one which ought not to have taken place. In the word “purchaser” there must in the circumstances be implied a requirement of good faith and lack of knowledge that the goods belonged to somebody else, because if there were that knowledge then the defect in the court proceedings would be obvious to the purchaser. The effect of the section would not be then to create a voidable contract; it was no contract at all. Although he may be protected, the official is committing a conversion of the goods in selling them, and the protection is a protection against a wrongful act.

The true intent of the legislature was to give the right to a good title only to a purchaser having no notice. Here, the chattels mortgage being registered, the purchaser must be deemed to have notice. Section 44 (3), in providing that “a person who purchases the goods in good faith under a sale by the bailiff shall, in all cases, acquire a good title to them against the trustee in bankruptcy,” is impliedly saying that a person who has not acted in good faith does not acquire a good title: it is submitted that the provisions of section 44 (3) overlap those of section 45 (3).

The words in section 45 (3) “the person from whom recovery

"is sought" are apt to describe anyone who is attacked by a person feeling aggrieved by the seizure or sale. There is no reason why they should not include the person whom the true owner of the goods seeks to attack complaining of the seizure and sale; there is no reason of grammar why the purchaser should not also be included in the operation of these words.

With regard to the proviso, the proper meaning of the opening words "nothing in this subsection contained" is "notwithstanding anything that has occurred before in this subsection" the right to the remedy given by the proviso shall not be affected. No one is to cut down that proviso by saying that something in the subsection has the effect of cutting it down. "Nothing" means "nothing." Those words are apt to make it clear that he has the same choice of remedy against any person other than those protected. [Reference was made to Halsbury's Laws of England, 2nd ed., vol. 14, p. 69, para. 116, and to *Curtis v. Maloney*.⁷]

Section 45 (3), even without the proviso, would give no protection to a person buying goods from a bailiff with knowledge that they were not the property of the execution-debtor. The qualification, "unless it is proved that the person from whom recovery is sought had notice . . . that such goods were not the property of the execution-debtor," relates to the provision that the purchaser shall acquire a good title as well as to the provision that no person shall be entitled to recover against the bailiff, etc.; the purchaser is affected by notice just as the bailiff and his agents are. The section is interfering with rights of property, and any other construction would lead to a greater interference with such rights than the clear meaning of the words requires. The section read complete with the proviso leads yet more plainly to this result; for the effect of the proviso is that anyone with a title to the goods sold, such as the respondents had in this case, retains his remedies against any person except the bailiff unimpaired by the operation of the section. Further, the natural meaning of section 4 of the Chattels Transfer Ordinance is that registration of an instrument is to operate as notice to everybody, and such notice is to be just as effective as actual notice would be. The result of taking the view for which the respondents contend leads much more to justice than the other view.

J. G. Le Quesne following. It is clearly established that unless there is a very clearly expressed intention in a statute,

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⁷ (1950) 66 T.L.R. (Pt. 2) 147; [1950] 2 All E.R. 201.

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it is not to be presumed that the legislature intended to produce an unjust or unreasonable result or to alter long established principles of law. And in particular, general words in a statute are not to be interpreted so as to produce such a result if that result can be avoided by limiting them in some way: *Hawkins v. Gathercole*⁸; *In re Brockelbank, ex parte Dunn and Raeburn*.⁹ Here the Board is asked to interpret this Ordinance—and also the effect of the English Act—in a way which would introduce a position which at the moment is quite unknown to English common law and unknown, unless the respondents are wrong, to English statute law, which has found it necessary in various statutes to say that in certain circumstances where one man's goods have been sold by another the purchaser shall get a good title. There appears to be no case in the law of England in which one man's goods have been wrongly sold by another and the purchaser, knowing what was going on, got a good title.

The limitation which should be put on the section is simply the limitation of knowledge, not of good faith. A purchaser has knowledge of everything that is registered under the Chattels Transfer Ordinance, the provisions of which are clearly enacted with the intention of making search under that Ordinance as easy as possible. In brief, it is submitted that the general words of subsection (3) of section 45 of the Bankruptcy Ordinance are not to be interpreted to introduce into the law so revolutionary a conception as that a purchaser with knowledge of the defect of his seller's title gets a good title.

Caplan in reply. It was conceded for the respondents that the origin of section 15 of the English Act of 1913 was two cases, *Crane & Sons v. Ormerod*¹⁰ and *Jelks v. Hayward*.¹¹ Bearing that in mind, it is manifest that where the bailiff had acted in excess of authority the legislature had to face two questions: (1) what was to happen in relation to the register in those cases; and (2) in relation to the bailiff; and section 15 of the Act of 1913 answers precisely those two questions, and answers in respect of (1), the purchaser gets a good title, and in respect of (2), the bailiff shall be protected unless he knew that the goods did not belong to the execution-debtor. That is a perfectly sensible scheme for dealing with the two aspects of the problem when the bailiff exceeds his authority. Imputed knowledge cannot take away the intention of the legislature that a good

⁸ (1854) 6 De G.M. & G. 1.¹⁰ [1903] 2 K.B. 37.⁹ (1889) 23 Q.B.D. 461; 5 T.L.R. 444.¹¹ [1905] 2 K.B. 460; 21 T.L.R. 527.

title should be taken. That scheme was incorporated into the legislation of Kenya. The words in section 45 (3) derive from section 15 of the English Act of 1913. The words in section 13 (2) of the Chattels Transfer Ordinance equally derive from an English Act—the Bills of Sale Act, 1878, s. 20; the decisions on the section have no real bearing on the present problem: *Swift v. Pannell*¹²; *In re Hewer, ex parte Kahen*.¹³ The Chattels Transfer Ordinance, section 13 (2), has nothing to do with, and has no effect on, section 45 (3) of the Bankruptcy Ordinance. If it had been intended that the sections should lock together, then different language would have been used.

There is no room for reading in a requirement of notice to a purchaser in a section which has expressly dealt with the requirement by attaching it to some person or persons, but has not seen fit to attach that requirement to a purchaser. There is no room for going outside the section. Here the legislature is saying that the purchaser gets a good title; it is not qualified by saying "provided that he has no notice," and in those circumstances it is not legitimate to imply it.

With regard to the canon of construction referred to by Mr. Le Quesne, one only uses that in two sets of circumstances: (1) where that expression which is used in the Act immediately brings into question a number of the categories which may be included under that expression; or (2) where the consequence of reading the expression in its widest sense results in something which is revolting to the sense of justice. The cases which he cited merely exemplify those two principles. The first has no application to the word "purchaser"—one does not think of categories of purchaser. On the second point, it is conceded that there is a presumption that Parliament is not intending to create a gross statutory injustice. The section is not intended to be a trap.

It is admitted that the appellant had statutory notice of the respondents' title, but not that he knew that the bailiff had no authority; that is quite a different thing. The appellant is to be deemed to have notice, but that does not give him actual notice. It is not conceded that he had any notice that the bailiff had no authority to sell, and that is far beyond any notice which the statute says is to be attributed to him. There are no authorities on this matter. [Reference was made to Williams on Bankruptcy, 16th ed., p. 345.]

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¹² (1883) 24 Ch.D. 210.¹³ (1882) 21 Ch.D. 871.

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As to the meaning of the proviso, there are certain rules applicable in construing a proviso which appears to be repugnant to the enacting section to which it is appended. One rule is that, if it can be done, some effect will be given to the enactment and some effect to the proviso. If, however, the position is reached where if effect is given to the proviso effect cannot be given to the enactment and vice versa, and one of them has to be void for repugnancy, it is the proviso which is void. Also, one is entitled to approach a proviso in a slightly different way from the manner in which one approaches the rest of the section, because it is recognized judicially that provisos are sometimes put in *ex abundanti cautela*. There is here no content in the words of the enactment if the proviso is construed in the way in which the respondents contend for. If the proviso is construed in its widest form there is no content in the enactment at all. It cannot be right to read the proviso in such a way as to result in an implied repeal of the enactment: *Riddell v. White*¹⁴; *Rex v. Dibdin*.¹⁵ In each case it is a matter of interpretation. Admittedly, it does seem that read in their literal sense those words in the proviso can have an effect on the words "the purchaser has a good "title," and it is therefore submitted that the proviso must be declared void for repugnancy or something must be read into it. [Reference was made to *Inland Revenue Commissioners v. John Dow Stuart Ltd.*¹⁶] With regard to the "injustice" point, if the respondents are right, the appellant gets nothing.

Mar. 16. The judgment of their Lordships was delivered by LORD REID, who stated the facts set out above and continued: It was not disputed that by virtue of their chattels mortgage the respondents were entitled to seize the vehicle unless the appellant by purchasing it from the court broker obtained a title to it good against the respondents. The effect of the chattels mortgage was that the respondents obtained a title to the vehicle, and section 4 of the Chattels Transfer Ordinance provides: "all persons shall be deemed to have notice of an "instrument and of the contents thereof when and so soon as "such instrument has been registered as provided by this "Ordinance." Accordingly, when the appellant purchased the vehicle he must be deemed to have had notice of the respondents' mortgage. But the appellant contends that by virtue of the

¹⁴ (1793) 1 Anstr. 281.¹⁶ [1950] A.C. 149, 177; [1950] 1¹⁵ [1910] P. 57, 122, 125; 26 T.L.R. All E.R. 1.
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provisions of section 45 (3) of the Bankruptcy Ordinance, c. 30 of the Laws of Kenya, 1948, he obtained a title good against the respondents notwithstanding the fact that he was deemed to have had that notice. This case therefore depends on the proper interpretation of that subsection of the Bankruptcy Ordinance. [His Lordship stated the terms of subsection (3) of section 45 of the Bankruptcy Ordinance and continued:] This subsection is a copy of section 15 of the English Bankruptcy and Deeds of Arrangement Act, 1913, with minor modifications which are immaterial in this case. There was no question of bankruptcy involved in this case, and at first sight it might seem that a provision in a bankruptcy ordinance taken from an English Act of which the long title was "An Act to amend the law with respect to bankruptcy and deeds of arrangement" would not apply. But their Lordships are satisfied that this provision does apply whether or not any question of bankruptcy is involved.

The respondents argued that the subsection does not apply to any case where the goods seized are the subject of a chattels mortgage and are in the possession of the grantor of the security because section 13 (2) of the Chattels Transfer Ordinance provides: "So long as an instrument continues to be registered hereunder, the chattels comprised in that instrument shall not be deemed to be in the possession, order or disposition of the grantor, within the meaning of the Bankruptcy Ordinance." So it is said that the vehicle must be deemed not to have been in the possession of Njoroge for the purposes of the Bankruptcy Ordinance and, as section 45 (3) only applies to goods in the possession of the execution-debtor when seized, it does not apply in this case. Their Lordships cannot accept that argument. The phrase "possession, order or disposition" is a well known and well-understood phrase in the English law of bankruptcy, and it appears to be used in the same sense in the Bankruptcy Ordinance, section 42 (c). In certain circumstances goods in the possession, order or disposition of the bankrupt are treated as the property of the bankrupt although the goods do not belong to the bankrupt, and section 13 (2) prevents goods which are the subject of a chattels mortgage from being treated as the property of a bankrupt grantor on the ground that they were in his possession, order or disposition. But the phrase "possession, order or disposition" is a single and indivisible phrase. The word "possession" cannot be taken by itself, and section 13 (2) does not mean that for the purposes of all other provisions in the Bankruptcy Ordinance chattels comprised in an instrument shall

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be deemed not to be in the possession of the grantor. In particular, section 13 (2) does not limit the application of section 45 (3) of the Bankruptcy Ordinance.

In construing section 45 (3) it is proper to bear in mind the position before the passing of section 15 of the English Act of 1913, from which it is copied. A bailiff or other officer was only entitled to seize and sell goods which belonged to the execution-debtor, but it was often difficult for him to ascertain the ownership of goods in the possession of the debtor and he might without negligence sometimes seize and sell goods which did not in fact belong to the debtor. He gave no warranty of title of the goods which he sold. A purchaser could seldom know or ascertain to whom the goods belonged but he had to take the risk of the true owner appearing and recovering the goods from him while he could not recover the price which he had paid for them. This was made clear in *Crane & Sons v. Ormerod*.¹ And the liability of the bailiff or other officer when he made a mistake was made clear in *Jelks v. Hayward*.² Section 15 of the 1913 Act must have been enacted to deal with that position, and it does in fact purport to confer rights on both the purchaser and the officer.

It will be convenient now to use the phraseology of the Kenya Ordinance. The conditions for the application of section 45 (3) are, (1) that the goods were in the possession of the execution-debtor at the time of seizure, and (2) that they were sold by the bailiff without any claim to them having been made by anyone. The subsection then enacts two things: first "the purchaser of the goods so sold shall acquire a good title to such goods," and secondly, "and no person shall be entitled to recover against such bailiff or any other person lawfully acting under his authority . . .": and it then adds a qualification, "unless it is proved that the person from whom recovery is sought had notice or might by making reasonable inquiry have ascertained that such goods were not the property of the execution-debtor." It was argued that this qualification applies both to the first enactment with regard to the purchaser and to the second enactment with regard to the bailiff. But it is in their Lordships' judgment impossible so to construe the words. If the qualification related back to the first enactment it would read "the purchaser of the goods so sold shall acquire a good title to such goods unless it is proved that the person from whom recovery

¹ [1903] 2 K.B. 37.

² [1905] 2 K.B. 460; 21 T.L.R. 527.

"is sought had notice . . ." The words "person from whom recovery is sought" clearly relate back to "no person shall be entitled to recover against such bailiff or any other person lawfully acting under his authority," but they cannot relate back to "the purchaser." Moreover, the realities of the situation make that construction probable: one would expect a bailiff to be required to make reasonable inquiry, but it is difficult to see what reasonable inquiry as to title could be expected of a person who intended to bid for goods at a sale by auction.

It was then argued that, although this might be the only proper construction of the enactment in ordinary circumstances, there is a principle of construction which requires general words to be limited if otherwise the enactment would produce highly unjust results, and that it is a very salutary general principle that a purchaser who knows that the seller is not entitled to sell should not be allowed to insist on his bargain. So it was argued that "purchaser" must here be held to mean purchaser without notice of the true owner's rights. But such an argument cannot prevail in the present case. The legislature in this subsection is conferring rights on two persons, the purchaser and the bailiff (or a person acting under his authority). It expressly provides that the bailiff shall not have this right if he had notice, but it makes no such provision about the purchaser. It must be inferred that this difference was made deliberately, and their Lordships must therefore hold that the subsection gives a good title to purchasers whether or not they had notice of the true position. It was hardly disputed that "a good title" must mean a title good against the true owner. Their Lordships think it right to add that it is not impossible to find reasons which might have led the legislature to confer such an unusual right on purchasers. It may have been thought necessary to give every encouragement to bidders at such sales by auction. There would be very few cases where a bidder in fact had notice of the true position and the possibility of constructive notice may have been neglected. It may have been thought advantageous to assure all purchasers that they could buy without risk even if that meant that in some cases the true owner would be deprived of one of his remedies.

Their Lordships now turn to the proviso. A purchaser is "a person other than such bailiff," and the true owner is a "claimant who may prove that at the time of the sale he had a title to such goods." So the proviso must mean in this context that nothing in this subsection shall affect the right of the true owner to any remedy to which he may be entitled against the

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purchaser. The enactment that the purchaser shall acquire a good title to the goods is in this subsection: apart from this enactment, one of the remedies of the true owner is that he is entitled to recover the goods or their value from the purchaser; so if the proviso were read by itself it would mean that the enactment in the preceding part of the subsection shall not affect the right of the true owner to recover the goods or their value from the purchaser. But that would completely contradict and nullify the enactment. A proviso may limit, and severely limit, the application of an enactment to which it is a proviso, but it could only be held in the most exceptional circumstances that the proviso nullifies the enactment. In the present case, if the enactment stands it does not nullify the proviso; it merely limits its application. There may be others besides the bailiff and the purchaser against whom the true owner has a remedy, e.g., the execution-creditor, and the proviso can apply in such cases. Whether the proviso was necessary in any of such cases may be doubtful, but at least giving effect to the enactment with regard to the purchaser does not entirely deprive the proviso of meaning.

Their Lordships agree with the decision of the Court of Appeal on this matter in *Curtis v. Maloney*³ and would not have thought it necessary to re-examine the matter had it not involved a general question of importance.

Their Lordships will therefore humbly advise Her Majesty that this appeal should be allowed, that the first part of question A submitted to the court in the stated case should be answered in the affirmative and the second part in the negative, and that the respondents should pay the appellant's costs in the courts below. The respondents must pay the appellant's costs in this appeal.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; Charles Russell & Co.*

³ [1951] 1 K.B. 736; 66 T.L.R. (Pt. 2) 869; [1950] 2 All E.R. 982.

ARTHUR VILLENEUVE NICOLLE . . .	APPELLANT;	J. C.*
AND		
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ANOTHER	RESPONDENTS.	Apr. 27.

ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

Channel Islands (Jersey)—Highway—Private road—Transfer to parish—Alternative methods—"Acte" of parish assembly accepting offer of transfer—Validity—Transfer by registered contract passed before court.

Highway.

The formal method of passing a contract before the Royal Court of Jersey, followed by its registration, is not the only effective way of vesting a private road in a parish by the law of Jersey, for a private road and its soil can be validly and effectively transferred to a parish to become a public road by means of an "Acte" of the parish assembly which accepts an offer of the previous owner, followed by the taking over of the road.

Approval by, or registration in the records of, the courts in the case of a gift of roads to a parish is directory and not mandatory.

Decision of the Superior Number of the Royal Court of Jersey affirmed.

APPEAL (No. 13 of 1951) from a decision of the Superior Number of the Royal Court of Jersey (October 19, 1950) affirming a judgment of the Inferior Number (Samedi Division) of the same court (April 13, 1950).

The question for decision in this appeal was whether a certain roadway in the parish of St. Martin adjoining property, known as "La Chaire Annexe," of the first respondent, H. F. J. Wigram, was the property of the appellant, A. V. Nicolle (subject to public rights of way thereover) or was vested in the parish of St. Martin as a public road.

The appellant contended that the roadway was his property, alleging that it had never been effectively transferred to the parish, and that consequently the respondent Wigram was not entitled without the appellant's permission to make in his boundary wall windows overlooking the roadway or to lay pipes for drainage of his premises in and under the soil thereof. The

* *Present:* LORD PORTER, LORD MORTON OF HENRYTON, and SIR JOHN BEAUMONT.

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respondent contended that the roadway was effectively transferred to the parish in 1925 by Mrs. Bayntum Roberts, the predecessor in title of the appellant, and that consequently, having been authorized by the constable of the parish to do the acts complained of, he did not require the appellant's permission. The correctness of those contentions depended upon whether events which took place in 1924 and 1925 culminating in an Act of the Roads Committee of the parish, dated January 9, 1925, and a confirmatory "Acte" of the parish assembly of January 15, 1925, could operate in Jersey law as an effective transfer of the soil of the roadway, there being in relation thereto no contract passed before the Royal Court and registered.

The appellant began the action out of which this appeal arose on June 26, 1948, and claimed that the respondent Wigram should be ordered to remove and fill in the windows opened by him in his wall, to remove a certain ventilation pipe and drain pipes protruding from his wall, to dig up and remove the drain pipes in and under the roadway and make good the same, and to pay to the appellant £500 for damages and expenses.

At the instance of the respondent Wigram the court ordered that the constable of the parish (who was the proper officer to represent the parish) should be cited, and the predecessor in office of the second respondent Henry Ahier (the present constable of the parish) accordingly became a party to the proceedings and supported the first respondent's defence based on the road in question being vested in the parish.

The Inferior Number of the Royal Court, whose decision was affirmed by the Superior Number, decided that the parish owned the soil of the road. The finding of the court was that "*par la coutume de cette île l'assemblée des principaux et officiers d'une paroisse sur le territoire de laquelle se trouve un chemin particulier peut accepter l'offre du propriétaire de tel chemin particulier de le transférer à la paroisse, pour être maintenu à l'avenir comme chemin public, sans qu'il soit nécessaire qu'un contrat héréditaire translatif de tel chemin particulier par son propriétaire à la paroisse soit passé devant justice, et qu'à partir de la date de l'Acte de l'assemblée par lequel telle offre est acceptée le ci-devant chemin particulier devient de plein droit chemin public.*" The appellant's action was accordingly dismissed.

The facts appear more fully in the judgment of the Judicial Committee.

1954. Mar. 2, 3, 4 and 5. *C. T. Le Quesne Q.C.* (English and Jersey Bars) and *L. V. Bailhache* (Jersey Bar) for the appellant. The question is whether the soil of the road belongs to the appellant or to the parish of St. Martin, represented by the second respondent. The road has been used freely by the public for a very long time, and there is no question of that liberty being denied to them. The case for the respondents is that the parish became the owners of the soil in 1925, because it was then given to them by Mrs. Roberts and accepted by an Acte of the parish assembly. The case for the appellant is that in 1932 Mrs. Roberts sold the barracks to the appellant, and the document purported to convey to him the soil in the road in question—she was conveying all that she herself had previously purchased from the War Department. The Jersey courts have found that the evidence established the existence of a custom that a parish may accept the offer of the owner of a private road within the parish to transfer it to the parish and that that transfer may be effected without the customary ceremony of a passation de contrat and registration in the public register. The passing of a contract before the court together with registration has been, it is submitted, in effect the system by which land has been transferred in Jersey inter vivos for centuries. The underlying idea is that the public register should enable anyone to know who owns any part of the land. The Jersey courts found that a private road becomes a public road from the date of the Acte of the parish assembly accepting the offer of transfer.

It is submitted, first, that there was no evidence on which the Jersey courts ought, or, indeed, could have found that there was that custom; and secondly, that even if there was evidence establishing the custom, it is in conflict with a fundamental principle of Jersey law relating to the transfer of land inter vivos and therefore inadmissible. There is no mention of this alleged custom in any writings on Jersey law, and no reference to it in any judgment of the Jersey courts. There are, however, cases where it is inconceivable that the writer should not have mentioned the custom if he had known that it existed. The public register is under the control of the Royal Court, and has been continuously kept since 1602: see *Actes des Etats de L'Ile de Jersey, 1597–1605*, 13th Publication de la Societe Jersiaise (1898), p. 64. There are a few dozen entries of contracts earlier than 1602. So far as this alleged custom is concerned, the earliest known exercise of it was in 1820, and in substance the only

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evidence of it relates to the parish of St. Helier. The respondents say that at various dates from 1820 onwards transfer by offer and acceptance has been taking place, and therefore a custom has been established. If, however, an attempt is made to carry this custom further back than 1820 very formidable difficulties are encountered. For some curious reason this custom is said to apply only to land which is described as a *chemin*. There are many instances between 1836 and 1932 where the acquisition of land for a road was effected by contract, and it is difficult to understand why one should go to the trouble and expense of that if what was desired could be effected by a resolution of the parish assembly. As regards the examples on which the respondents rely, reference may be made to Le Quesne's Constitutional History of Jersey, p. 528.

If this alleged custom existed in 1820 there was no reason to go through the ceremony which is described at p. 336 of the *Droit Coutumier de Jersey*, by C. S. Le Gros—it was a wholly unnecessary application. Further, if the custom, which is said to have been in existence for over 100 years, had been known to Le Gros, one would certainly expect him to have said something about it there. There is no doubt that as regards transfer of land *inter vivos* publicity has always been regarded by the law of the island as essential: *Godfray v. Constables of the Island of Sark*.¹ It is stated in the printed case for the respondent Wigram that: “The practice of transferring roads to parishes without passing a contract but simply by means of Actes of roads committees and assemblies following an offer is a survival in modern form of the ancient practice of passing contracts ‘à l’ouïe de paroisse.’” That probably takes one back to the earliest form of transfer of land in the island, where the proceedings probably took place without anything being put into writing at all. But from early times, certainly from the fourteenth century, the agreement was put into writing, and read out and signed: Poingdestre, *Les Commentaires sur L’Ancienne Coutume de Normandie*, 1907 ed., p. 3. There is an example of a contract of the middle of the fifteenth century set out in Le Quesne's Constitutional History of Jersey, at p. 565, and in Le Gros, *Droit Coutumier de Jersey*, p. 435, which shows that at that date there was a reading out in public and also a ceremony in the court, both parties being present and taking the oath, and there was a signing and sealing of the contract. In other words, there was a complete *passation*

¹ [1902] A.C. 534, 538-9.

de contrat but, as yet, no registration. Registration was first ordered in 1562: Le Quesne's Constitutional History of Jersey, p. 184—for the Ordinances there mentioned, see the Jersey Prison Board case, Treasury Appendix, Part 2, p. 229. A certain number of contracts were thereafter registered. Then in 1602 the States dealt with the matter again, and passed the Act setting up a public register: *Actes des Etates de L'Ile de Jersey, 1597-1605*, 13th ed., pp. 64-5. That is still the law of Jersey; and a penalty was to be imposed if there was a failure to register by deliberate default. [Reference was then made to a passage which counsel said that he had extracted from a manuscript copy of a still unpublished work by Poingdestre, *Nouvelles Coutumes*, written in 1668, and submitted that one could hardly have wider words as regards the necessity for passation and registration of a contract for the alienation of land. *Les Lois et Coutumes de L'Ile de Jersey*, pp. 28 and 30, para. 5, and *Les Commentaires sur L'Ancienne Coutumes de Normandie*, pp. 3, 7 and 58, both by Poingdestre, were also referred to.] Privileges, *Lois & Coutumes de L'Isle de Jersey*, by Le Geyt, p. 14, art. 17; p. 39, art. 5, is really a codification up to a point of the law of Jersey by Le Geyt—it has only his authority—and where he deals with actions relating to ownership of land he clearly means that in order to get a title to land one has to pass a contract in court; that, of course, is subject to the exception of a title arising from prescription. See also *Les Manuscrits de Le Geyt*, vol. 1, pp. 118-9. And in *Les Cours Royales des Iles Normandes*, by Julien Havet (1878), at p. 164 it is said: “Aucun contrat n'est valable en justice, s'il n'est passé sous le sceau de la baillie.”

After 1602, when the States established the public register, the next piece of legislation referring to it is the Code of Laws of Jersey, 1771, p. 276: and see also Le Quesne's Constitutional History, pp. 187 and 359. There is no reference at all in that work to any such exception to that rule as is said to be constituted by the alleged custom. Such a custom is entirely inconsistent with the system of land registry in Jersey, and to admit it is to admit a custom which is entirely irreconcilable with the well-established principles of the transfer of land in Jersey *inter vivos*. [Reference was also made to *Les Manuscrits de Le Geyt*, vol. 4, p. 139.] It is submitted that *ouie de paroisse* disappeared in Jersey after the establishment of the public register. There is no instance of this custom earlier than 1820, so that if it is a survival of the *ouie de paroisse*, it is a survival which had, so

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to speak, gone underground for over 100 years. And there are considerable differences between *ouie de paroisse* and the alleged custom. In the former there was a public reading, after divine service, outside the church, open to the whole parish. The alleged custom only requires the parish assembly to accept the offer; the parish assembly cannot be attended by every member of the parish. The *ouie de paroisse* was a far more public thing; and also it was only part of the procedure, which involved the presence of both parties and the swearing of an oath. There is nothing in the alleged custom which corresponds to those formalities at all. Nobody represented Mrs. Roberts in the present case. For those reasons it cannot be treated as a survival of the *ouie de paroisse*.

If Poingdestre had regarded it as a survival of the *ouie de paroisse* he must have referred to it as such in his *Lois et Coutumes*, at p. 30. See also Le Gros, *Droit Coutumier*, at p. 435; the evidence given before the commissioners appointed in 1859 to inquire into the laws of Jersey, and the Report of the Commissioners, dated 1861, p. XVIII. The absence of any allusion to the supposed custom in those passages supports the submission that there was and is no such custom.

It is said by the respondents that land may be transferred without a contract, and *Nicolle v. Poignand and Another*² is said to support that proposition. That case does not decide that the fonds of the road can be transferred to the parish simply by a resolution of the parish assembly. The necessity for a contract was not argued in that case; and the two things which emerge from it are: (1) the constable did not say that the road could be transferred to the parish without a contract; and (2) he did not suggest that it could be transferred to the parish simply by a resolution. The respondents also relied on *Procureur General and Another v. Poingdestre*³; that case is distinguishable in two respects: (i) it was a decision about the transfer of land and not of a chemin—and the alleged custom simply relates to the transfer of a road; and (ii) they were not dealing with a resolution of a parish assembly but of a roads committee: it is a long way from the alleged custom with which the Board is now concerned. Neither of the two last-cited cases establishes the possibility of the transfer of a road to a parish by a bare acceptance by the parish assembly of an offer. They do not show that a chemin

² Unreported. App.Ct., Dec. 2, 1825.

³ Unreported. App.Ct., Oct. 27, 1865.

can be transferred by doing nothing more than the alleged custom requires. And, finally, there is no reference in either of them to this alleged custom. [Reference was also made to Poingdestre, *Nouvelles Coutumes*, art. 244.] This alleged custom, which the evidence shows grew up about 1820, is not in any event of sufficient standing, so to speak, to prevail against the rule of law, and if it is a custom, it is astonishing to find it growing at all, because the legal climate was sufficiently unfavourable to the growth of a custom which would introduce a breach into the existing system of land transfer.

Next, it is stated in the printed case for the respondent Wigram that "Article 7 of the Law of 1869 on 'Chemins Ruraux' " (country roads) [*Recueil des Lois*, vol. 2, p. 421], which applied "to the parish of St. Martin, makes the agreement of the parties "in cases where land is acquired for the purposes of widening an "existing road by the parish registrable in the public register at "the *option* of the constable." It is submitted, however, that that Act did not say that the property in the land was transferred without registration in the public registry; it did not say that a parish could declare a road to be public without passing a contract in the court or applying to the court; and the use of the very curious phrase "*sera enrolé dans le livre des Actes du Comité* "des Chemins, pour valoir ce que de raison" indicates that the entry in the minutes of the roads committee is not to be treated as conferring an absolute title, but only for what it is worth.

Two cases may be cited about the conflict between custom and established law. The established rule in Jersey on the transfer of land *inter vivos* is a contract and registration. The rule, apart from registration, was common law in Jersey by 1562. The common law has been strengthened and extended—including the necessity for registration—by legislative enactments of 1562, 1602 and 1771. This alleged custom conflicts with those legislative enactments, which are equivalent to statutes, and for that reason is legally inadmissible: *Goodwin v. Robarts*⁴; *Rex v. Joliffe*.⁵ The Board is being asked to give effect in the present case to a custom which, if proved, is bad in point of law.

Further, there are some things about this alleged custom which appear to be uncertain: *inter alia*, was it enough that the parish accepted the offer, and if so, had it to be accepted by the roads committee or by the parish assembly; was it necessary, in addition to that action by the parish, that application should be

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⁴ (1875) L.R. 10 Ex. 337, 357.⁵ (1823) 2 B. & C. 54, 59, 62.

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made to the court; if so, was it enough that the act of the court should be registered in the court rolls, or must it be registered in the public register. The alleged custom is bad for uncertainty.

Lastly, a tacit acceptance will not satisfy the requirements of the custom and, even if the custom does exist, the offer and the acceptance which are alleged in this case do not satisfy it.

L. V. Bailhache following. With regard to the question whether the custom is reasonable, if this alleged custom exists it will mean that conveyancers in the island will find it extremely difficult to make a complete check on title. Under the present system one goes to the public registry, where search is easy. If this custom exists it will mean that one has to go to the country parishes and search through their records. And, apart from the inconvenience, the constable of the parish has an absolute right, if he so desires, to say that no one who is not a principal or officer of the parish shall have the right to look at those registers. It means that the constable would have the power to prevent any conveyancer from checking up the title to the property, and while that is, of course, unlikely in practice, he would have that power in theory. There cannot be two parallel types of conveyance.

Charles Russell Q.C. and *P. H. Giffard* (Jersey Bar) for the first respondent. There are concurrent findings of the courts below that the road is not the property of the appellant, but of the parish council. That finding is based first on a true concurrent finding of fact—an offer and acceptance of the transfer of the soil having regard to the documents and the oral evidence. If that finding is based on a finding of law—that by custom a private road can be transferred by offer and acceptance—then, of course, it is open to review. That finding of law can only be successfully attacked by the appellant establishing the proposition that there is only one possible way in Jersey law of transferring land in private roads, namely, by contract passed before the court, apart from the 40-year prescription period. All that the respondents are saying is that there is more than one way, and that by the customary law of Jersey the assembly of a parish on whose territory a private roadway is situate can lawfully accept the offer of the proprietor of the road to transfer it to the parish with a view to it being maintained thereafter as a public road; and in such case no contract is required in order to effect a legal transfer of the road to the parish. And, with effect from the date of the Act of the assembly by which the offer is accepted by the parish, the former private roadway becomes in law a public road and

becomes the property of the parish to whom it has been so transferred.

In determining whether or not this custom is part of Jersey law it is more important to see, not whether it is so expressed in the opinions of writers or in any judgments, but what has been done. If Le Gros knew that even in cases of this kind it was impossible to transfer land except by contract passed before the court in a technical sense, it must have leapt to his mind that the case he referred to at p. 336 of his *Droit Coutumier de Jersey* was an instance of a transfer without any such passing. When Le Gros makes a statement that the transfer requires a contract, he is obviously making it as a general statement, and not directing his mind to any exception that might be established. If an imaginary legal historian was looking at the facts, say in 1820, to find out what was the law of Jersey, he would look to see what had been done, and he would certainly find, looking back over 100 years, that when a parish was offered a transfer of an existing roadway the normal practice to achieve it was not by having a contract passed at all. The commissioners pointed out the difficulty of finding out what the law was: Report of the Commissioners appointed to inquire into the Civil, Municipal and Ecclesiastical Laws of the Island of Jersey, 1861, p. VIII. The imaginary historian would also find that there was no statute which said in terms that no hereditament could be transferred *inter vivos* except by passing a contract. He would, of course, have said rightly that there was nothing wrong in that method, but that there was more than one method in this particular case.

There are very many instances in Jersey of private roads being acquired by parishes as public roads without a contract being passed but by acceptance of an offer by the owners of such private roads and by an Acte of the parish assembly, and 57 examples of this are given in an admitted schedule produced in the court below. The fact that there may be many examples of acquisition by parishes of private roads as and for public roads by contract does not support the suggestion that no other method of acquisition is possible. It should be presumed that the method of transfer in the above-mentioned 57 instances, having been adopted and acted upon as valid and effective by the former owners and by the parishes and the public, were valid and effective and in accordance with the law of Jersey. There appears to be no difficulty in attending any parish for the purpose of discovering any transactions.

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The Ordinance of 1562 recognized a transfer passed either before the court or in some other place of record; but it expressly referred to *ouïe de paroisse* (see Jersey Prison Board Appendix Part 2, p. 229). It is not therefore correct to say that there was only one method of conveying land, namely, by passing a contract. Neither the Ordinance of 1602 nor the Code of 1771 lays down that all transfers of land must be effected by means of a contract; they simply made provision for registration of conveyances by one method, namely, passing a contract before the court; they carry the matter no further by way of exclusion of the particular form of conveyance adopted in the present case. The practice of transferring roads to parishes without passing a contract but simply by means of *Actes* of road committees and assemblies following an offer is a survival in modern form of the ancient practice of passing contracts "*à l'ouïe de paroisse*." The appellant's approach to the problem is a false one; there is nothing expressly to prevent the method the respondents contend for; it has sufficient notoriety, it has been adopted for over 100 years, it is easily susceptible of explanation, and *omnia praesumuntur rite esse acta*. A private road can lawfully be transferred to a parish by the owner offering it to the parish and by the latter accepting the offer by means of *Actes* of its roads committee and assembly. While there is no reported case which directly supports that proposition, it is a proper inference from *Nicolle v. Poignand and Another*⁶ and *Procureur General and Another v. Poingdestre*⁷ that no contract is in fact needed to transfer a private roadway to a parish.

With regard to article 7 of the Law of 1869, which, although abolished in 1941, was in full force in 1925 when Mrs. Roberts transferred the road to the respondent parish, if no registration was needed when a parish acquired land to widen a road, there is no logical reason why a contract should be needed when a parish acquired a whole road—the legal principle involved in either case being the same, namely, the acquisition of land for the purpose of a public road without a contract.

Lastly, it was suggested for the appellant that as a matter of fair construction of the resolution of the parish assembly, they were not accepting an offer made by or on behalf of the then owner of the property. That is an unsustainable construction of the events which took place in 1924–25. There was here an offer

⁶ Unreported. App.Ct., Dec. 2, 1825.

⁷ Unreported. App.Ct., Oct. 27, 1865.

by Mrs. Roberts to transfer the road subject to conditions, and an acceptance by Acte.

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Frank Gahan Q.C. and *D. P. Richardson* (Jersey Bar) for the second respondent. Whether the road in question is a public road is a question of fact which, without error of law, has been determined by both courts below in favour of the respondents. By the law of Jersey a road within a parish, privately owned, becomes a public road vested in the parish if an offer to transfer the road to the parish is accepted by Acte of the parish roads committee confirmed by the parish assembly, and there is no support for the appellant's contention that the only effective way of vesting a road in a parish is by deed of transfer which has been duly acknowledged by the parties thereto before the Royal Court and then registered in the registry of deeds. If the appellant is right, then it would be possible for a good many roads in other parishes to be challenged as not having effectively passed to the parishes. The facts here constituted an acceptance of an offer to have this road transferred to the parish. Without repeating anything which has been said on behalf of the first respondent, the method of transferring land by passing a contract before the Royal Court is not an exclusive method, and unless it can be shown that it is the only permissible method, there is nothing here to impeach the finding of law of the Jersey courts. The register is merely an index of copies of deeds between parties; it does not bind anyone.

Le Quesne Q.C. in reply. In the courts of Jersey a plaintiff or a defendant establishes his title *prima facie* to a piece of land simply by pointing to the entry in the public register. It is not suggested that that ends the matter, but it establishes a *prima facie* case: *Recueil des Lois*, vol. 2, p. 245. Although it may be incorrect to say that every case of transfer involves a contract, it is correct to say that every transfer involves an application to the court. The alleged custom cannot have grown up subsequently because it is irreconcilable with the Ordinance of 1562, which is statute law. It may be theoretically possible to have two methods of effecting transfers, but that is only possible on the assumption that both are legal, and the alleged custom is contrary to the express terms of the Ordinance of 1562.

Apr. 27. The judgment of their Lordships was delivered by LORD PORTER. This case raises a difficult question of the law of the Island of Jersey for their Lordships' determination. The point at issue is as to the method of transference of a parcel of

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land from private ownership to one of the parishes of Jersey so as to make it public property. The appeal is from a judgment of the Superior Number of the Royal Court of that Island which affirmed a judgment of the Inferior Number of that Court. The facts as found by the court of first instance can be shortly stated.

In 1810 the War Department acquired certain land and built Rozel Barracks upon it. When erected, the barracks left a strip of land outside the north and west walls to serve as a new road in place of one enclosed within their curtilage. In fact the War Department for many years allowed this road to be used as if it were a public road, and the parish authorities treated it as such and from 1866 at least sold the sweepings, an action which was unjustified unless it was a public road.

In 1910 the Comité des Chemins of the parish of St. Martin, in which the property in question is situated, visited the road the ownership of which is involved. They were accompanied by the officer then in command of the Royal Engineers and by a representative of the seigneur de Rozel, and passed a resolution or "Acte" that the road in question belonged to Her Majesty's Government and that the seigneur had a right of way over it. The resolution went on "Considérant que ledit chemin sert également à l'usage du public et qu'il y a lieu de le maintenir "à l'avenir comme chemin public à la charge de la paroisse," and then proceeded to instruct the constable to send a copy to the officer commanding for the information of Her Majesty's Government.

In fulfilling the instructions the constable wrote "You will observe that in the opinion of the committee the site of the roadway . . . is Crown property subject to a public right of way." In his reply of March 1, 1911, Major Brooker, who was then in command, stated that he was directed to acquiesce in the opinion of the committee and added: "The War Department is prepared to transfer this road at once to the parish authorities, provided the Department is put to no expense for such transfer; that the road be maintained as a public road; and that the Department, or future owner of Rozel Barracks, be secured all frontage rights and the tour d'échelle for repairs to that property, and way leave for any drainage water or other pipes that it may be desired to place under the road without causing permanent damage thereto."

No further steps appear to have been taken at that time, but in September, 1924, the War Department sold to a lady née Ross,

who was then a Mrs. Rose and who later, in 1926, married Mr. Bayntum Roberts. The method of transferring the ownership was that usual since 1771 and common before that date, under which a "passation de contrat" took place before the court in the presence of the parties, who acknowledged the transaction and swore to observe its terms. The contract was then inscribed in the public register of the Island. It conveyed the land over which the road passed and contained a clause reading as follows:—

"Et souffriront ladite preneuse et acquéreuse et ses hoirs droit de chemin et passage toutes fois et quantes pour l'usage du public par sur certain chemin ou ruelle qui longe en partie par l'ouest ainsi que par le nord les murs extérieurs desdites casernes et ce conformément aux termes tant de certain Acte du Comité des Chemins de la paroisse de St. Martin, en date du cinquième jour de Décembre mil neuf cent dix, que de certaine lettre datée du premier jour de Mars mil neuf cent onze signée par Edward Part Brooker Ecr., alors Major Commandant le Génie Royale en cette Ile pour et au nom du Département de la Guerre de Sa Majesté au connétable de ladite paroisse de St. Martin relativement à l'usage dudit chemin par le public, recours à iceux, et ce en outre tels titres spéciaux comme peuvent exister à ce sujet."

Immediately after the transfer of the property to Mrs. Rose her solicitors wrote to Mr. Pallot, the then constable, announcing the conveyance, setting out the clause just transcribed and the wording of the letter of March, 1911, and added: "As there seems to have been no written confirmation of this from the then constable of St. Martin, we take it that these conditions were tacitly accepted and now operate. We would be glad to have your written confirmation for purposes of record."

The reply of the constable had better be set out in full. It is in these terms: "Referring to your letter of September 8, 1924, I beg to inform you that the road north and west of Rozel Barracks has been looked after by the parish of St. Martin for many years, therefore by so doing, I take it that the conditions as specified in the letter of March 1, 1911 (addressed to the then connétable of St. Martin and signed by Edward Part Brooker, Esq., Major C. R. E.) had been tacitly accepted.

"At a meeting of 'principaux et officiers' duly convened and held in the St. Martin's public hall on January 15, 1925, I brought the above matter before the said meeting, when by a unanimous vote it was agreed to confirm the acceptance of the

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“ offer made by Major Brooker on behalf of the War Department, “ and I was requested to inform you of said confirmation.”

The letter and reply were duly passed on to and accepted by Mrs. Rose. The confirmation referred to was effected by means of an “ Acte ” of the Comité des Chemins of the parish. The wording of the Acte is as follows: “ Vu certaine communication “ de la part de Messrs. Renouf et Ereaut, en date du 8 Sep- “ tembre, 1924, par rapport à une lettre en date du 1 Mars, 1911, “ dans laquelle le Département de la Guerre offre de transférer à “ la paroisse de St. Martin une certaine ruelle qui longe en partie “ l’ouest, ainsi que part le nord des murs extérieurs des casernes “ situées à Rozel et ledit transfert n’ayant pas été confirmé.

“ Vu également l’Acte du Comité des Chemins en date du 5 “ Décembre, 1910, à ce sujet. Le comité à l’unanimité, après “ délibération a décidé qu’il est dans l’intérêt public de confirmer “ ledit transfert et a chargé le connétable de demander à “ l’assemblée des principaux et officiers d’approuver ladite con- “ firmation.”

This Act was duly confirmed by the parish assembly on January 15, 1925.

The further facts which give rise to this litigation are that Mrs. Rose sold the barracks to the appellant on February 6, 1932. The conveyance purported to pass such property as Mrs. Rose purchased from the War Department with a right of way over the road in question in conformity with the terms of the Acte of the Roads Committee of the parish of December 5, 1910, already referred to, and of Major Brooker’s letter of March 1, 1911.

To the west of the barracks and immediately beyond that portion of the road, now the subject-matter of dispute, which runs north and south, lies a house which the respondent purchased from the appellant some time about the year 1947. Shortly afterwards, with the consent of the respondent parish, the respondent built six windows overlooking the road and within three feet of it, and also with the like consent installed on his own property a sewage disposal plant and placed some pipes and vents belonging to this plant in the road in issue.

If the road in question is the property of the appellant both these acts were unjustified and constituted a tort as against the appellant.

As a result the appellant, in June, 1948, commenced an action against the respondent complaining of the matters aforesaid and asking for an injunction and damages. His contention was that he had purchased from Mrs. Rose such property as she owned,

that this property included the road in question, that by the law of Jersey a private road or, indeed, any property can only be transferred by a "contrat héréditaire" passed according to the usual forms before the High Court and that neither the Government nor Mrs. Rose had followed the required procedure, with the result that the soil of the road and, it may be, all rights over it were retained by Mrs. Rose and transferred to Mr. Nicolle.

The respondent on his part maintained that the offer contained in the letter from Mrs. Rose's solicitors in 1924 followed by the Acte of the parish in 1925 were effective to transfer the property in the road and the rights over it to the parish, at any rate when combined with acts only consistent with the rights claimed by the parish.

As the rights of the parish were involved, the constable, Mons. Henry Ahier, was later added and became a co-defendant with Mr. Wigram and claimed that by the law of Jersey a road and its soil could be effectively transferred to a parish by means of an Acte of the parish meeting which accepted an offer of the previous owner.

In their Lordships' opinion the letters which passed in 1924, coupled with the events of January, 1925, amounted to an offer by Mrs. Rose to transfer the road to the parish on the terms set out in the letter of March 1, 1911, and an acceptance of that offer.

The sole question, therefore, for their Lordships' consideration is whether in law a private road can be transferred to the parish by this means. No question of a particular custom arises: what has to be determined is what is the general law of Jersey. That such a method is ineffective to pass the property is asserted by the appellant and supported by reference to the historical incidents and growth of the law of the Island.

It is, as their Lordships think, common ground that prior to the year 1562 the ordinary, if not the only, method of transfer was by audience of the parish (ouïe de paroisse), i.e., the conveyance was pronounced before the parish in the churchyard. At that time no writing nor apparently any formal act of the parishioners was required. This informality led to a number of abuses and frauds and accordingly certain royal commissioners were appointed for the affairs of Jersey who, with the advice of the local authorities, framed certain ordinances, those relative to the transfer of land providing that: "Henceforth all hereditary contracts bargains or conveyances . . . shall be passed before the court or in a place which bears record or otherwise the true copy thereof shall remain for record in the hand and custody of the court for and

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“to the end that in time to come if any one loses his title or evidencies he may easily recover them.”

Later on it is ordered that “henceforth no contract or conveyance of heritage . . . shall be made in churchyards save “publicly on a solemn day at the end of Divine service.” The ordinance went on to provide that to bear witness of the bargain at least six men of standing should bear witness of the deed previously put in writing to which they should set their marks and further “that the bargain or contract should be duly proved “within 40 days.”

These provisions were followed by the enactment in 1602 that all transfers of hereditary contracts which in future were passed before the court should be registered in the prescribed manner.

Nearly two centuries later, in 1771, the Code of the Laws of Jersey was agreed upon by the States of the Island of Jersey and approved by His Majesty. This Code re-enacted the provisions of the Act of 1602 and declared that all hereditary contracts which should be passed before the court should be written out in full in the register and after registration the contracts should be produced before the court in order that they might be compared with the entry in the register and later returned to the parties.

The usual procedure for the conveyance of land is perhaps best described in the Report of the Commissioners presented to Parliament in 1861: they say at p. XVIII, under the sidenote “Conveyances”: “All conveyances of real property, whether “lands or rentes, take place by matter of record. A short and “very simple deed (or contract, as it is called) is drawn up, “containing the names of the parties, the consideration, a description of the property and the nature of the interest conveyed and “a warranty of the title by the conveying party. This contract “is passed before the Royal Court consisting of the bailiff and “two jurats, who sign it and cause it to be sealed with the seal “of the bailiwick; it is then registered, being transcribed verbatim “and at length in the register of contracts. It is so completely “a record of the court that the parties do not even sign it: they “merely appear, and having been sworn, express their assent to “it. It expresses on the face of it that the parties appear before “the court (*devant justice*), and at the end of the document they “are condemned by the court to fulfil its conditions.”

This method, the appellant maintains, is the only means by which a conveyance of land can be made, and adds that the enjoyment of a right of way can only be gained by a conveyance of the soil since, in the words of Lord Davey when delivering the

judgment of the Board in *Godfray v. Constables of the Island of Sark*¹: “ In the Channel Islands, however, the doctrine of dedication to the public is unknown, and the public, like a private individual, must make out their title to a right of way by grant or prescription.” Some qualification of these observations is made by the statement that a forty years’ possession by the parish as a public way accompanied by acts of ownership might (or might not) support a servitude in the parish, but no such claim is made in the present case.

Apart from the laws which have been mentioned, the appellant’s advisers support his case by reference to the textbook writers upon the laws of Jersey. In addition to the matters already set out, they point to Le Quesne’s *Constitutional History of Jersey*, [1856] pages 185 and 186, page 359, and from page 565 set out the form of a contract for sale of a rent of the year 1465. It is to be observed that whilst the mode of transfer of land after 1602 is stated to be according to the method prescribed in 1602 and confirmed in 1771, it is assumed that in earlier times heritable property was accustomed to pass by proclamation in the churchyard even without writing.

Similarly, in his *Coutumes Reformée*, Poingdestre says: “ Nous observons que nulle promesse héréditaire n’est valable, si elle n’est passée par devant le bailly et jurés et enregistrée. Anciennement il falloit qu’elle fût audiencée a ouïe de paroisse. Mais pur le present n’usons plus gueres de lectures de lettres depuis l’établissement de registre public. En quoi nous ne faisons pas bien ”—a statement which seems to imply that the customary method of conveying land in the seventeenth century was by registration. But the author in this passage is dealing with the transfer to descendants and the word “ promesse ” may be limited to such a transfer.

Havet writes to the same effect when he says: “ Aucun contrat n’est valable en justice s’il n’est passé sous sceau de la baillie.” He goes on to point out that in Edward the First’s time only verbal agreements could be made in the Island as there was no means of passing a written deed.

So, too, Le Geyt in *Lois et Coutumes de l’Isle de Jersey*, which apparently reached its final form about the beginning of the last century, says in Title I, article 17, that all contracts of sale ought to be passed under oath before the “ bailly et 2 jurez,” and in Title IX, article 5, repeats this statement and

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¹ [1902] A.C. 534, 538; 18 T.L.R. 671.

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adds that assignments of "rente" and exchanges agreed upon between the parties which are presented to and read publicly in court pass without oath and are enrolled in the records of the court in order that they may have continuing effect.

Furthermore, it is pointed out on behalf of the appellant that none of the writers or writings referred to suggest that any exception exists in the case of the transference of a road to the parish.

Their Lordships have set out these authorities since they present a formidable case on behalf of the appellant, and if they apply to the transfer of roads to a parish would seem to show that the road in question had never been effectively transferred to the parish.

The respondents on their part rely upon the letters which passed between Mrs. Roberts' representatives and the constable in 1924 and 1925 together with the "Actes" of the comité des chemins and of the parish assembly on January 9 in the latter year as a renewal of the government's offer in March, 1911, and its acceptance in 1925. This contention was accepted by both courts in Jersey. They say that Mrs. Ross "renouvela . . . " l'offre faite le 1 mars, 1911 " and " L'assemblée des principaux " et officiers de ladite paroisse, le 15 janvier, 1925, accepta ladite " offre." As they have indicated, their Lordships are of opinion that this is the effect of those letters coupled with the " Actes," and consequently it has to be determined whether the road in question could in law so pass to the parish and become public.

The courts in Jersey held that it did and expressed their views by saying: " Considérant que par la coutume de cette île " l'assemblée des principaux et officiers d'une paroisse sur le " territoire de laquelle se trouve un chemin particulier peut " accepter l'offre du propriétaire de tel chemin particulier de le " transférer à la paroisse, pour être maintenu à l'avenir comme " chemin public, sans qu'il soit nécessaire qu'un contrat héréditaire translatif de tel chemin particulier par son propriétaire à " la paroisse soit passé devant justice, et qu'à partir de la date " de l'Acte de l'assemblée par lequel telle offre est acceptée le " ci-devant chemin particulier devient de plein droit chemin " public; "

In the respondents' contention the method of transferring a road to a parish is not confined to one way only. In their submission it is essential to consider what steps have been taken from at least 1817 to the present time to transfer roads to parishes in Jersey, and they rely upon decisions of the courts of

Jersey as showing that offer and acceptance by "Acte" of the parish at any rate if followed by the taking over of the road by the parish is a valid method of transfer.

By way of supporting their thesis the respondents have produced a list of some 63 cases of the transfer of roads to a parish, in none of which has there been any registration in the public register though in some six cases the transfer has been registered in the books of the Royal Court, and point out that throughout this period the two law officers were members of the council of the parish in which they lived and that it is unlikely in all instances they were ignorant of what was going on. The appellant's advisers on their part, however, have called attention to a number of instances where the formal method of "contrat" and registration has been followed, to the fact that the respondent's list is confined to two parishes and that there are only four examples taken from one of these two so that in substance the instances are confined to St. Helier, which was rapidly growing, and they suggest may have neglected the prescribed forms.

Such an argument might prevail if the instances taken were either few in number or confined to a short period of time, but they extend over 120 years and, having regard to their frequency, it is difficult to envisage that the provisions of the law were neglected in so many cases, especially as it appears from page LXI of the Report of the Commissioners in 1861 that the parochial assembly was composed of persons of position and importance and is a public body. Moreover, the existence of a certain number of cases in which the formal method of transfer has been used is far from conclusive in proving that no other method was possible.

But examples in which property has been passed to a parish in the more informal way are not confined to mere instances in which the steps asserted as necessary by the appellant have not been carried out. Two decisions which support this practice are quoted in the case presented by the respondents. In the first, instituted in 1825 by Edouard Nicolle, constable of the parish of St. Helier, against Messieurs Poignand and Durell, who had offered to transfer two roads to the parish, the constable complained that behind the back of the parish the lower court of Jersey had declared the roads public although the offer had never been accepted. When the case came on for appeal it was contended that according to ancient usage every proprietor of a private road who wishes to make it public must apply to the assembly of

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the parish to accept the ownership, and that when the assembly does accept the offer it makes an Acte which the constable presents to the Royal Court that it may be registered in the Court Rolls. Nevertheless, the Superior Court rejected the constable's submission, condemned him in costs and discharged the defendants from the action. It is true that this result was only arrived at by the casting vote of the Chief Magistrate, but it is a decision of the Superior Court and goes further in its informality than is claimed in the present case. If a registerable contract was necessary it is difficult to see why its absence was not relied upon, as it would have constituted an incontrovertible plea on behalf of the constable.

Similarly in 1865, in an action by the Procureur General and constable of the parish of St. Lawrence against Elizabeth Poingdestre, where the lady claimed under a contract duly passed before the court whereas the title of the parish was an "Acte" of the roads committee, it was held, it is true, that the lady's title prevailed. But the ground of the decision was that the "Acte" of the parish had not been followed by the taking of possession, and without such taking the "Acte" was insufficient to pass the title. Here again, if a registered contract was necessary, in their Lordships' view a plea to that effect must have been asserted and prevailed.

Moreover, in Le Gros' book on the *Droit Coutumier de Jersey*, at p. 336, two cases are referred to in which "Actes" of the parish were read in the Royal Court accepting an offer of two roads as public streets, whereupon the court declared them public. There was, it is true, in these cases at least a public reading in court, but there is no suggestion of the necessity of the registration of a contract. Offer and acceptance and the court's approval were held to be enough.

In their Lordships' opinion approval by, or registration in the records of, the courts in the case of a gift of roads to a parish is directory and not mandatory. This view is, they think, borne out by article 7 of the *Règlement sur l'Élargissement des Chemins Publics* of 1889 relating to "Chemins Ruraux," under which an agreement made between the parties (i.e., the proprietor and the parish) shall be enrolled in the book of the Actes of the "Comité des Chemins" of the parish and may be ("pourra") at the instance of the constable entered in the public register. In this phraseology the use of the word "pourra" and not "devra" is significant.

Nor, indeed, is the respondent's contention inconsistent with the various measures which have been referred to, and in particular it is not inconsistent with the Code of 1771, which at p. 276 says: "Tous les contrats héréditaires qui seront passés par devant justice seront enregistrés selon les ordres des commissionnaires," and at p. 277 under the heading Registres it is stated: "Tous contrats ou passemens qui seront faits par devant le bailli ou son lieutenant, et deux ou trois jures justiers seront écrit en lettres formelles, et seront délivrés audit enregistreur." Word- ing which at any rate in terms does not apply to all such contracts but only to those which are brought before the court.

Finally, their Lordships cannot fail to be impressed by the fact that neither those acting for Mrs. Rose nor the members of two courts in Jersey found difficulty in reaching the conclusion that a private road could validly pass from private to public ownership by an offer duly accepted or implemented by an Acte of the parochial assembly.

Their Lordships agree with this conclusion and will humbly advise Her Majesty to affirm the judgment of the courts of Jersey. The appellant must pay the costs of both respondents of the appeal to their Lordships' Board.

Solicitors: *Herbert Smith & Co.; Charles Russell & Co.*

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[HOUSE OF LORDS.]

PARKE DAVIS & CO. APPELLANT; H. L. (E.).*
AND
COMPTROLLER-GENERAL OF PATENTS,
DESIGNS AND TRADE MARKS AND
ANOTHER RESPONDENTS.

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Feb. 5, 8;
Mar. 11.

Patent — International convention — Medicine — Compulsory licence — Application—International Convention for the Protection of Industrial Property, 1934 (Cmd. No. 5833), Treaty Series No. 55 (1938), art. 5A (4)—Patents Act, 1949 (12, 13 & 14 Geo. 6, c. 87), ss. 41 (1), 45 (3).
Statute—Construction—International convention—Statute subject to convention—Construction of convention.

* *Present*: LORD SIMONDS L.C., LORD OAKSEY, LORD MORTON OF HENRYTON, LORD ASQUITH OF BISHOPSTONE and LORD COHEN.

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Article 5A (4) of the International Convention for the Protection of Industrial Property, 1934, which provides that a compulsory licence may not be granted within three years of the date of the issue of a patent, relates only to the prevention of abuses resulting from the exercise of exclusive rights conferred by patents. Therefore the powers of the Comptroller-General of Patents to grant a compulsory licence in respect of food and medicine under section 41 (1) of the Patents Act, 1949, which is not concerned with such abuses, are not fettered by that article and the grant of a compulsory licence under the section within the three years' period is not inconsistent with treaty obligations.

Decision of the Court of Appeal (sub nom. *Reg. v. Comptroller-General of Patents and Designs; Ex parte Parke Davis & Co.*) [1953] 2 Q.B. 48; [1953] 2 All E.R. 137 affirmed.

APPEAL from the Court of Appeal (Singleton, Jenkins and Morris L.JJ.).

This was an appeal, by leave granted by the House of Lords on July 30, 1953, from a judgment of the Court of Appeal dated May 12, 1953, affirming a judgment of the Divisional Court of the Queen's Bench Division (Lord Goddard C.J., Lloyd-Jacob and Parker JJ.), which refused an application by the appellant company, Parke Davis & Co., for a writ of prohibition directed to the first-named respondent, the Comptroller-General of Patents, Designs and Trade Marks, prohibiting him from permitting to proceed an application under section 41 of the Patents Act, 1949, by the second-named respondents, British Drug Houses Ltd., by which they sought a compulsory licence under the appellant company's letters patent numbered 652280, 660381 and 652273 granted to them in 1951 and 1952 relating to the manufacture of an antibiotic.

Section 45 (3) of the Patents Act, 1949, provided: "No order shall be made in pursuance of any application under sections 37 to 42 of this Act which would be at variance with any treaty, convention, arrangement or engagement applying to the United Kingdom and any convention country." The sections referred to related to compulsory licences.

The short point in this case was as follows: The appellant company contended that article 5A of the International Convention for the Protection of Industrial Property, 1934, was one of the international obligations which were attracted by the subsection to all applications for compulsory licences to work patented inventions, with the result that it protected the patentees in all cases, upon whatever ground the compulsory licence was sought, for an initial period of three years, since article 5A (4) as translated

provided: "In any case, an application for the grant of a compulsory licence may not be made before the expiration of three years from the date of the issue of the patent. . . ." The respondents, on the other hand, contended, as the Divisional Court and the Court of Appeal each unanimously found, that article 5A related only to compulsory licences granted on the ground of some abuse by the patentee of the monopoly rights granted to him and had no reference at all to the special class of compulsory licences under section 41 of the Patents Act, 1949, in respect of inventions concerned with the matters therein set out (viz., inventions relating to food or medicine), granted independently of the conduct of the patentee. The question was therefore essentially one of the proper construction of the international convention in the light of the Patents Act, 1949. The relevant provisions of the Act and of the convention are set out in the opinion of Lord Cohen.

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D. N. Pritt Q.C., K. E. Shelley Q.C. and Guy Aldous for the appellant company. Two points are principally relied on: (1) "En tout cas," the phrase at the beginning of article 5A (4) of the original of the International Convention for the Protection of Industrial Property, means what it says, i.e., "in any case" "whatsoever," and produces the result that in any case in which any country, applying its own municipal law, is considering an application for a compulsory licence on any grounds and in any subdivision in which it chooses to subdivide its patent law, there is an agreement to impose a three years' pause. (2) If it be said that "en tout cas" means only in any case where an application for a compulsory licence is based on some form of abuse and that abuse has nothing to do with section 41 of the Patents Act, 1949, the words do not allow of such a construction. "Abuse" is a conception so imprecise and hard to define as not to provide a good foundation for an argument on construction and, indeed, section 41 is as much concerned with abuse as section 37.

The argument favoured in the courts below was that there is a distinction between compulsory licences granted on the ground of abuse and compulsory licences independent of it. This was based on a contrast between sections 37 and 41. But the wide conception of abuse apparent in section 6 of the Statute of Monopolies, 1623 (21 Jac. 1, c. 3), shows that it does not necessarily relate to people's actions and that what is regarded is rather an abuse of public interest than faulty conduct by the patentee. Sections 37 and 41 of the Act of 1949 both deal with public policy

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and it cannot be said that one is concerned with abuse and the other wholly divorced from it. In section 41 (1) "good reasons" for refusing the application must include the attitude of the patentee. Section 37 (2) does not deal simply with acts which are faulty or undesirable as against acts which are contrary to public policy. Whatever may have been previously the definition or the conception of abuse, what in fact would be the difference between dealing with section 37 and section 41? Under section 37 the patentee must show that there was no abuse or prejudice to public policy. Under section 41 he must show that there is good reason for refusing the application, and that must include showing that there is no abuse; under that section one can consider abuse more widely than under the other. It is not accepted that this section is not concerned with the exercise of the patentee's rights nor any abuse resulting therefrom, nor that the sufficiency or otherwise of compulsory licences to prevent abuses cannot arise under it. Unless section 45 (3) refers to this particular problem, it is hard to find a function for it in relation to section 41.

The respondents relied on precedent legislation and international conventions, e.g., the International Conventions for the Protection of Industrial Property of 1883, 1900, 1911 and 1925, the Patents, Designs and Trade Marks Act, 1883, s. 22, the Patents and Designs Act, 1907, ss. 24 and 27, Patents and Designs Act, 1919, ss. 1, 11 and 27, Patents and Designs (Convention) Act, 1928, s. 2, Patents and Designs (International Convention) Act, 1938, s. 3. But the extent to which the court can look at previous legislation is very limited. In this case it cannot be invoked to affect the construction of section 45 (3) of the Act of 1949.

But the clear meaning of article 5A (4) of the convention of 1934 is reinforced by the change in the language used in contrast to that of article 5A (4) of the previous convention of 1925. It is not admitted that the old article 5A (4) did not affect food and drugs, but the new language is clearer and stronger.

It is argued that it would be monstrous if the legislation were so construed that for three years a patentee could sit still and not let the public get the benefit of some food or medicine. But the position is not as simple as that. In patent law there is always a superficial conflict between the patentee and the public. Since the time of James I it has been recognized that one must offer private interests an adequate reward to do the work and take the risks. If the rewards were inadequate research workers might

not patent and disclose their discoveries but might keep their processes secret. H. L. (E.)

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It cannot be said that article 5A (4) of the convention does not apply because there is not perfect correspondence between the convention and the municipal legislation relating to it, and it indicates a misunderstanding of the right way to construe the article to say that in section 41 there is no question of a default for which the patentee can be required to justify himself. The suggestion that something was slipped into the Act by mistake shows that a wrong method of construction is being applied. An international convention need not follow the recognized practice of this country.

In article 5A (4) the words used are “*a compulsory licence*,” not “*the*,” and this indicates that it is not referring to the compulsory licences referred to in article 5A which are related to abuses. The words “*justify himself by legitimate reasons*” do not necessarily refer to exculpation, excuse or justification of a blameworthy act or omission.

Accordingly, though this application is within section 41, the Comptroller has no jurisdiction to grant a compulsory licence until after the expiry of three years from its grant.

Shelley Q.C. following. There is no ground for differentiating the words of sections 41 and 37 by reference to “*abuse*” or “*default*.” Both are, in the relevant sense, dealing with abuses. They are concerned with the actual proof of a fact and not the consideration of a theory. That there is no material distinction between them is shown by the fact that if the patentee is willing to grant a licence on reasonable terms the Comptroller will not grant a compulsory licence under either section: see section 37 (2). The position under both sections is identical.

The whole point of the three years’ delay provided for in article 5A (4) is that the patentee may know that whatever happens he will get a three years’ monopoly. The purpose, then, is to strike a balance between monopoly, which provides remuneration, and disclosure, which promotes research. The deliberate policy of the convention is to ensure three years’ monopoly because in the long run it will be to the public benefit. A complicated invention involves great research. This consideration gets over all the logical difficulties suggested. A domestic legislature can withdraw from the monopoly whole classes of patents without a breach of the convention provided that for three years there is an effective monopoly whatever happens. The prospective patentee comes into the field of monopoly with his

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eyes open. He has an invention for a new chemical and he may choose between patenting it or using it as a secret process. If he thought that he could be deprived of his patent monopoly within three years he would probably choose the latter course. This convention should be construed in its simple ordinary meaning so that "in any case" in paragraph 5A (4) means what it says. No compulsory licence should be granted on any ground whatever within three years in cases under section 41. The reference in section 45 (3) to the group of sections including that section shows that to grant a licence under it was recognized as being a possible breach of the convention.

P. Stuart Bevan for the Comptroller-General of Patents, Designs and Trade Marks was not called on to argue.

Sir Hartley Shawcross Q.C., *J. P. Graham Q.C.* and *Stephen Gratwick* for the respondent company were not called on to argue.

Their Lordships took time for consideration.

March 11. LORD SIMONDS L.C. My Lords, I have had the benefit of reading the opinion which my noble and learned friend, Lord Cohen, is about to deliver and, as I agree with it in all respects, I do not think it necessary to trouble your Lordships with a separate opinion. The question at issue appears to me to be incapable of any answer, except that which has unanimously been given by the Divisional Court, the Court of Appeal and your Lordships. I shall content myself, therefore, with moving that the appeal be dismissed with costs.

LORD OAKSEY. My Lords, I, too, have had the advantage of reading the opinion which my noble and learned friend, Lord Cohen, is about to deliver, and I agree with it.

LORD ASQUITH OF BISHOPSTONE. My Lords, the point raised in this case is an extremely short one: namely, whether article 5A of the International Convention for the Protection of Industrial Property, 1934 (hereafter called "article 5A") is limited to cases in which there are "abuses" of patent rights within the meaning of that article, or not. The answer, in my view, plainly is that it is so limited, and that consequently the appeal fails.

The following are the reasons why the contest is narrowed down to this issue: and the reasons why I think that that contest should be resolved in the sense indicated:—

(1) Section 45 (3) of the Patents Act, 1949, reads as follows :
 “ No order shall be made in pursuance of any application under
 “ sections 37 to 42 of this Act which would be at variance with
 “ any treaty, convention, arrangement or engagement applying
 “ to the United Kingdom and any convention country.”

(2) Sections 37-42 mentioned in this section obviously cover section 41 : and section 41 is the section under which the order complained of by the appellants has been made in this case.

(3) Applications for orders under section 41 are *not*, as I read that section, based on the abuse of patent rights by the patentee. In this respect section 41, in my judgment, contrasts with section 37, application for orders under which *are* based on such “ abuses.” The provisions of section 41 are based on the special position of food, medicines and surgical appliances as articles in urgent demand.

(4) The point for decision is therefore whether an order made under section 41, and therefore (if I am right so far) *not* made on the ground of an “ abuse of patent rights,” is invalidated by article 5A of the 1934 convention.

(5) It accordingly becomes crucial to decide whether article 5A is limited to orders made on the ground of “ abuse ” : or extends to orders made on other grounds ; which other grounds alone, in my view, can be entertained under section 41.

(6) I am satisfied that article 5A is limited to orders based on “ abuse.” It has five sub-articles, of which the fourth is the most important. Sub-article (1) is clearly directed (and limited) to objectionable conduct on the part of the patentee, which may be paraphrased as “ abuse.” Sub-articles (2) and (3) are based on the existence of “ abuse ” eo nomine. Sub-article (4), the application of which is mainly in question, is, I think, quite clearly so limited.

The words “ In any case ” (“ En tout cas ”) with which this sub-article opens have been much relied on by the appellants as imparting generality of application to the sub-article. But, in my view, having regard to the last three sub-articles, it is to be read as applying to situations ejusdem generis with those to which the earlier sub-articles apply, namely, cases founded on “ abuse.” “ In any case ” means “ in any such case.” If there was any doubt on this point it is surely removed by the words which follow : “ This licence may only be granted if the patentee is “ unable to justify himself by legitimate reasons.” To justify himself against what ? Clearly against the suggestion that he has been guilty of abusing his rights, as, for instance, by conduct

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falling within section 37. A man cannot be required to justify himself in respect of something which is not his fault, e.g., the vital character of, or urgent need for, the commodities in question, which is the real ground for applications under section 41.

For these reasons, in my view, the order made under section 41 is not in any way at variance with the only relevant provision of any convention and should be upheld. Much discussion has revolved round the question whether the construction of article 5A which I favour depends on reading that article along with precedent legislation, e.g., the English Acts of 1919 and 1907. I would only say that if those Acts had never been passed I should still construe the article in the same sense.

For these short reasons, in addition to those in the opinion about to be delivered by my noble and learned friend, Lord Cohen, which I have had the advantage of reading, I agree that the appeal should be dismissed.

LORD COHEN. My Lords, I am asked by my noble and learned friend, Lord Morton of Henryton, who is unable to be present today, to say that he, too, agrees that the appeal should be dismissed with costs.

My Lords, this is an appeal from an order of the Court of Appeal affirming a decision of the Divisional Court who rejected a motion for an order of prohibition, the object of which was to restrain the respondent, the Comptroller-General of Patents (to whom I shall refer hereafter as "the Comptroller") from permitting to proceed an application by the second respondents, British Drug Houses Ltd., for a compulsory licence. The application was made under section 41 of the Patents Act, 1949, in respect of three convention patents granted to the appellants in the years 1951 and 1952. The original applications in relation to those patents were made in the United States of America and the British applications were based thereon.

Section 41, reproducing section 38A of the Patents and Designs Act, 1907, is one of a group of sections (sections 37-45) dealing with compulsory licences and revocation of patents. Section 37 enables any person interested to apply to the Comptroller for authority to exercise the patent monopoly on a number of grounds, all of which are related to the patentee's own exercise or non-exercise of his monopoly. Sections 38 and 39 deal with the operation of section 37. Section 40 enables any government department to apply on any of the grounds mentioned in section 37 for the endorsement of a patent with the words

“licences of right” or for the grant to any person specified in the application of a licence under the patent. An application cannot be made under section 37 or under section 40 until the expiration of three years from the date of the sealing of the patent to which the application relates. This restriction was required to give effect to article 5 of the 1934 convention, to which I shall refer hereafter.

Section 41 differs from sections 37 and 40 in that the right to a compulsory licence arises not by reason of the patentee’s exercise or non-exercise of his monopoly, but solely on account of the character of the invention, i.e., if the patent is in force in respect of—(a) a substance capable of being used as food or medicine or in the production of food or medicine; or (b) a process for producing such a substance as aforesaid; or (c) any invention capable of being used as or as part of a surgical or curative device. It provides that the Comptroller shall, on application made to him by any person interested, order the grant to the applicant of a licence under the patent on such terms as he thinks fit, unless it appears to him that there are good reasons for refusing the application. Section 41 differs from sections 37 and 40 also in that no restriction is placed by the section on the time at which application can be made. It can be made at any time after the grant of the patent.

Section 42 deals with the revocation of a patent in respect of which an order for a compulsory licence has been made and provides that no application for revocation can be made until two years have expired from the date of the grant of the compulsory licence. This restriction also owes its origin to article 5 of the 1934 convention.

The only other provision of the group of sections to which I need refer is section 45 (3), which is in the following terms:

“No order shall be made in pursuance of any application under “sections 37 to 42 of this Act which would be at variance with “any treaty, convention, arrangement or engagement applying “to the United Kingdom and any convention country,” a description which includes the United States of America.

In the case before your Lordships the appellants admit that the second respondents’ application is in respect of patents which fall within section 41, but they allege that as the application was admittedly made within three years of the earliest date of issue of any of the three patents to which the application relates, the Comptroller had no jurisdiction to entertain the application because of article 5 of the International Convention for the

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H. L. (E.). Protection of Industrial Property, 1934 (Treaty Series No. 55 (1938)). This convention was signed on June 2, 1934, and ratified by His Majesty, the ratification being deposited on June 30, 1938. The convention which was signed was in the French language, but an official translation is printed at p. 70 of Appendix II of the printed case for the House of Lords. In this translation article 5, so far as material, reads as follows:—

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“ A.—1. The importation by the patentee into the country
“ where the patent has been granted of articles manufactured in
“ any of the countries of the Union shall not entail revocation of
“ the patent.

“ 2. Nevertheless each of the countries of the Union shall have
“ the right to take the necessary legislative measures to prevent
“ the abuses which might result from the exercise of the exclusive
“ rights conferred by the patent, for example, failure to work.

“ 3. These measures shall not provide for the revocation of
“ the patent unless the grant of compulsory licences is insufficient
“ to prevent such abuses.

“ 4. In any case, an application for the grant of a compulsory
“ licence may not be made before the expiration of three years
“ from the date of the issue of the patent, and this licence may
“ only be granted if the patentee is unable to justify himself by
“ legitimate reasons. No proceedings for the revocation of a
“ patent may be instituted before the expiration of two years
“ from the date of the granting of the first compulsory licence.”

The question at issue between the parties is whether paragraph A (4) of article 5 applies only to licences granted under sections 37 and 40 of the 1949 Act or extends to licences granted under section 41 of that Act.

The 1934 convention replaced an earlier convention signed in 1925 dealing with the same subject-matter. The first three paragraphs of article 5 of that convention were in the same terms as paragraphs A (1) (2) and (3) of the 1934 convention. Paragraph (4) read as follows: “ In no case can the patent be made
“ liable to such measures before the expiration of at least three
“ years from the date of grant of the patent and then only if the
“ patentee is unable to justify himself by legitimate reasons.”

It is, I think, plain that paragraphs (2) and (3) of both conventions are directed, and directed only, to enabling a contracting country to protect the public interest against some act or neglect of the patentee—i.e., against an abuse by the patentee of his monopoly rights—and have no relation to an application under section 41 based on the character of the invention. Mr. Shelley

submitted that there was no material distinction between sections 37 and 41, since in either case the Comptroller would not grant a licence if the patentee were willing to do so on reasonable terms. I am unable to accede to this argument. In a case under section 41 the willingness of the patentee to grant a licence on reasonable terms might result in the applicant accepting it and thus obviate the need for an order, but I do not think that it would deprive the Comptroller of jurisdiction to grant compulsory licences.

If the measures referred to in paragraphs (2) and (3) of the 1925 convention were measures to prevent the abuses of the kind referred to in section 37, it necessarily follows that paragraph (4) dealt only with the same measures, for the expression "such measures" can refer and refer only to the measures mentioned in paragraph (2).

If that be so, it is plain that section 38A of the Patents and Designs Act, 1907, did not conflict with any provision of the 1925 convention, and that a licence could have been granted under section 38A at any time after the grant of the patent. But it is said that the change of language in article 5A of the 1934 convention is significant enough to make paragraph A (4) embrace the case of licences under patents in respect of food and medicine.

I agree with Jenkins L.J. that if such a change in the law had been intended, I should have expected to find plain language used to effect it. I cannot see any such plain language in paragraph A (4) of article 5. On the contrary, the change in language is, in my opinion, such as was the inevitable consequence of introducing the two years' period of grace between the granting of the first compulsory licence and the institution of any proceedings for revocation. Moreover, the provision in paragraph A (4) that the licence may only be granted if the patentee is unable to justify himself by legitimate reasons seems to me appropriate only to an application for a licence grounded on some act or default of the patentee.

Mr. Shelley relied strongly on the use of the words "In any case" with which paragraph A (4) begins. I cannot accede to the argument. Like Jenkins L.J.,¹ I think that the widest meaning which can be given to the phrase is "in any case of the kind dealt with by this article." To see what kind of case the article deals with it is necessary to look at the earlier paragraphs of it, and for the reason I have given I think it is clear

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¹ [1953] 2 Q.B. 48, 64; [1953] 2 All E.R. 137.

H. L. (E.). that the earlier paragraphs deal only with applications for compulsory licences grounded on abuse of the monopoly. I would add that while "in any case" is no doubt a literal translation of "en tout cas," a less literal translation might more accurately have rendered the sense of the French original.

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The last sentence of paragraph A (4) seems to me to lead to the same conclusion. The revocation there referred to must, I think, be a revocation grounded on abuse.

Mr. Shelley submitted that the very fact that section 45 (3) referred to a group of sections which included section 41, strongly supported the appellants' case, for it suggested that the grant of a licence under section 41 might be at variance with some convention. I doubt whether it is proper to construe the provisions of the convention by reference to an Act passed eleven years after the convention came into force, and I incline to the view that the inclusion of section 41 in the group of sections referred to in section 45 (3) is explained if section 45 (3) is construed as referring not merely to any convention existing at the date of coming into force of the Act but also to all such treaties, arrangements or engagements as might thereafter be made. It must also be noted that sections 37, 40 and 42 are all framed so as to conform with the requirements of article 5A and yet the draughtsman of the Act thought it necessary to include references to them in the section 45 (3). This suggests that if section 45 (3) was not inserted for the reason I have indicated, it was inserted *ex abundanti cautela* and not on account of any definite view as to the bearing of article 5 of the convention on each of the sections 37 to 42.

I cannot sum up my conclusions on the matter of construction in language better than that used by Jenkins L.J. when he said²:
 "... reading article 5 of the Convention of 1934 as a whole, and
 "giving the best consideration I can to the various indications
 "as to its meaning to be extracted from the language used, it
 "seems to me that it is reasonably plain that this article is
 "referring simply to measures, whether by way of grant of
 "compulsory licence or revocation, to prevent abuses of monopoly
 "rights, and has no reference at all to the special provisions of
 "the English legislation, under which a compulsory licence may
 "be granted in respect of substances capable of being used as food
 "or medicine."

² [1953] 2 Q.B. 48, 65-6.

I do not find it necessary, therefore, to reach a conclusion as to how far it is permissible to have recourse to the history of the English legislation in order to construe the provisions of the convention. If it is permissible, that history would, I think, lead to the same conclusion. Whenever His Majesty's Government was party to a convention of this kind, it took steps at once to make such amendments in its patent legislation as it thought necessary to give effect to its obligations under the convention. It did so in 1938. Yet it did not introduce any time limit into the provisions of the Act dealing with compulsory licences under patents covering food and medicine (section 38A). As Morris L.J. said in the Court of Appeal³: "On the appellants' sub-missions . . . from 1938 until 1949 the legislature, having set out to embody in English law the matters agreed by the convention, entirely failed to understand the language of the convention. If at a later date the full effect of the words had become apparent, [in the sense for which the appellants contend] I should have thought that . . . in section 41 . . . there would have been some express reference to the time limitation."

For the reason I have given I would dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Tackley, Fall & Read; Solicitor to the Board of Trade; Bristows, Cooke & Carpmael.*

³ [1953] 2 Q.B. 68.

[HOUSE OF LORDS.]

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					AND		
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Company — Shares — Sale — Fraud of director during negotiations — Sale authorized by members — Fraud preceding authorization — Tort complete when fraud acted on — Whether innocent shareholders liable vicariously to purchasers of shares.
Fraud. Vicarious liability.

Company X was licensed to manufacture and sell synthetic cream, if made in accordance with a formula approved by the

* *Present*: LORD OAKSEY, LORD REID, LORD TUCKER, LORD ASQUITH OF BISHOPSTONE and LORD COHEN.

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Ministry of Food. R, the managing director, increased the amount manufactured by introducing water and disregarding the formula. This was not known to any other director or to any shareholder. In 1948, without authorization, he approached the directors of Company Y with a view to the sale to them of the shares of Company X, the other members of which were unaware of the negotiations. Throughout the negotiations he never disclosed that the company's accounts were based on dishonest trading. A point in negotiation was reached when he brought the matter before his fellow directors and before a general meeting of the company. The proceedings were recorded in the following minute: "The chairman reported 'that the directors had received a proposition with regard to the 'whole of the company's shares. . . . The proposition . . . had 'been received from [Company Y] whereby that company would 'purchase from the shareholders . . . their preference shares for '35s. per share and their ordinary shares for 15s. per share. 'This matter was discussed very fully, and it was agreed that [R], 'who had already been in negotiation with [Company Y] should 'take the matter up further with that company with a view to 'completing the transaction on the above basis.'" The proposed transaction having been completed, the purchasers, after they discovered the fraud, brought an action for damages against a shareholder of Company X who had no knowledge of R's fraudulent concealment:—

Held, that on the true interpretation of the minute R was appointed agent on behalf of the shareholders to negotiate the sale of their shares and that in the circumstances they were responsible for any fraudulent misrepresentation which he made in the course of the subsequent negotiations. In negotiating from the outset on the basis that the accounts represented the company's true position, he continued to make that fraudulent misrepresentation, which to his knowledge influenced the purchasers, up to the time the contract was completed, and the shareholders could not disclaim responsibility for it and were liable in damages.

Per Lord Tucker: The tort of fraudulent misrepresentation is not complete when the representation is made; it becomes complete when the representation, not having been corrected in the meantime, is acted on by the representee. If it was false when made but true when acted on there is no misrepresentation.

Decision of the Court of Appeal (sub nom. *Briess and Others v. Rosher and Others*) [1953] 2 Q.B. 218; [1953] 1 All E.R. 717 reversed.

APPEAL from the Court of Appeal (Lord Goddard C.J., Morris and Romer L.JJ.).

This was an appeal from an order of the Court of Appeal dated February 17, 1953, reversing so much of the judgment of Barry J. as directed that judgment be entered for the appellants, the plaintiffs in the action, Hans John Briess, Robert Pintus, Hugh Spencer Strauss, Paul Fischer and Cereal Manufacturing Co.

(Chelsea) Ltd., against the respondents, the third defendants, Charles Robert Woolley, Evelyn Ernest Bath and Edith Sophia McRea (as executors of Sir Charles James Hugh McRea, who died after the issue of the writ and whom they represented in these proceedings), with costs, and ordering instead thereof that judgment be entered for the respondents against the appellants with costs. (The company was added as an alternative plaintiff to one Ascher Jedlin who was subsequently struck off the record.) The action was tried without a jury in the County of Middlesex on July 15, 16, 17, 18, 21, 30 and 31, 1952, and judgment was entered in favour of the appellants against the first defendant, Francis Edwin Rosher, since deceased, and the respondents for the sum of £5,400 with costs, the action having been discontinued against the second defendant, Lord Sempill, before trial. (The fourth defendant, A. S. Harrison, was not served.)

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The plaintiffs' claim in the action, which was commenced by writ of summons issued on March 30, 1950, was for damages for fraud on the sale of shares in a company known as Nutrifood Products Ltd., which sale was effected by the then shareholders to the plaintiffs pursuant to a contract made between the plaintiffs' agent, a company known as Economic Utilities Ltd., on their behalf, and Rosher, for and on behalf of himself and all the other shareholders in Nutrifood including Sir Charles James Hugh McRea. The plaintiffs alleged that the fraud consisted of false representations and fraudulent concealments practised by Rosher on behalf of himself and all the other shareholders, whereby the plaintiffs were induced to agree to, and did, acquire the shares in Nutrifood for an amount greatly in excess of their value.

The facts are fully set out in their Lordships' opinions.

Gerald Gardiner Q.C. and *Neil Lawson* for the appellants. A principal is liable for the acts of his agent if, waiving inquiry into a transaction induced by a wrongful act, he takes the benefit of it: see *Hunter v. Parker*¹; *Lewis v. Read*²; *Hilbery v. Hatton*³; *Marsh v. Joseph*⁴; *Spencer Bower on Actionable Misrepresentation*, 2nd ed., p. 3, art. 9, and p. 77, art. 73. If one effects a sale by one's agent, who signs the contract, one cannot ratify the contract and take the money payable under it while at the same time disclaiming the way in which the contract was brought about.

¹ (1840) 7 M. & W. 322, 326.

² (1845) 13 M. & W. 834.

³ (1864) 2 H. & C. 822.

⁴ [1897] 1 Ch. 213, 234, 242, 250;
13 T.L.R. 136.

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The Court of Appeal was wrong in taking too narrow a view of the relevant minute, which shows that Rosher was appointed by the shareholders to negotiate the sale of their shares. Further, the court was wrong in taking the view that there was one specific misrepresentation made once and for all. It is unrealistic so to hold in the case of fraud to induce a sale, where there is presented a false picture of the thing sold with intent to deceive, and there is fraudulent concealment of its true nature. The true view, which was that of Barry J., is that the fraud, which was effective to induce the sale, was cumulative. He was right in holding that the fraud of Rosher was repeated and continued to be operative after the meeting on October 14, 1948, whereby the plaintiffs were induced to enter into the contract and suffered damage. Thus the shareholders were liable for his fraudulent misrepresentations both because they were repeated after that date and before the contract became binding on November 12, 1948, and because the representations made before October 14 were continuous and were not corrected by Rosher or his principals before November 12. By appointing him to be their agent on October 14 they accepted responsibility for the representations which he had previously made. As to the liability of principals adopting the acts of their agents, see Coke's Institutes, 8th ed. (1809), Part IV, c. 73, p. 317, and *Lloyd v. Grace, Smith & Co.*⁵ A principal who ratifies a contract of sale made with his authority by his agent can take and retain the benefit of it, although it was obtained by the agent's fraud, but he cannot then escape the corresponding liability.

Neil Lawson following. One must bear in mind the ingredients of the tort of deceit. One is that the false statement is made to induce the representee to act on it. The tort is not complete until the representee has acted on it. One must consider the whole situation as affecting the mind of the representee between the making of the representation and his acting on it. The representation is not actionable without damage. Here the tort was complete on November 12 when the offer was accepted.

Cyril Salmon Q.C. and *Conolly Gage* for the respondents. This is not an action for rescission of the contract, nor is it based on unjust enrichment. It is an ordinary common law action for damages for deceit. It involves two questions: (1) Was Rosher appointed the shareholders' agent to make representations on their behalf and with their authority? (2) Did he make any misrepresentation after October 14 on their behalf? If both questions are

⁵ [1912] A.C. 716, 738; 28 T.L.R. 547.

answered in favour of the plaintiffs they must succeed. Otherwise, a third question arises: (3) Did the shareholders adopt the misrepresentations made by Rosher before October 14?

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As to (1), the unanimous decision of the Court of Appeal was right in the finding that on October 14 Rosher was not appointed by the shareholders to make representations on their behalf. The only point is what he told the directors on October 14 and what they said to him. The true meaning of the material minute is that he was only authorized to accept the sum offered by the prospective purchasers and that he was not authorized to do anything else. There is no reference to October 14 in the plaintiffs' pleadings. To succeed in an action of deceit against the shareholders the plaintiffs must prove that the representations were made with their authority; but it is only shown that Rosher had authority to get in touch with the persons concerned in connexion with accepting the offer made to the shareholders. If the evidence is ambiguous the plaintiffs have not discharged the onus of proving Rosher's authority.

The fact that, without the authority or knowledge of the shareholders, Rosher had made fraudulent misrepresentations could not impose on them a duty to correct them afterwards. The shareholders did not ratify Rosher's agency on October 14 and, ruling out ratification, they were not liable for misrepresentations made after that date either. But, assuming that he was appointed agent on October 14, and that what he said previously was untrue, nothing said subsequently when he was their agent can fix them with responsibility for what he had said previously. The essential part of the tort was committed when he was not their agent, for he made no misrepresentations afterwards. A principal is liable for his agent's acts only after he became his agent, and he can disclaim responsibility for misrepresentations previously made. Otherwise in this and other cases great hardship would result. A false representation is made when it is made and it does not straggle over a period of time. This one was made by Rosher when he was not the shareholders' agent. Once he made the misrepresentation the wrongful act was complete, although no action for damages would lie until the representees suffered damage. The misrepresentation was not continuing, though its consequences continued, and the fact that those consequences took effect after Rosher became the shareholders' agent did not render them responsible. As to continuing representations, see *With v. O'Flanagan*.⁶

⁶ [1936] Ch. 575; [1936] 1 All E.R. 727.

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With regard to the question of ratification, one can ratify a contract or adopt a representation. But in this case no contract qua any other shareholder had been entered into by Rosher before October 14. He had made misrepresentations to the prospective purchasers which had deceived them, and the question is whether the shareholders adopted those misrepresentations. Before A can ratify or adopt anything done by B he must know that B had purported to act on his behalf. But there is nothing to show that Rosher purported to act on behalf of the other shareholders before October 14 nor that on that date he told them that he had even purported to do so. As to ratification, see *Keighley, Maxted & Co. v. Durant*.⁷

If the principals had had cause for suspicion but did not make inquiries, they might have been bound by the agent's fraud, but they had no ground for thinking that any fraudulent misrepresentation had been made. Accordingly, they could not adopt it. In this case no inference can be drawn that they were reckless. In actions for fraud a special onus rests on the plaintiffs.

There is no evidence and no finding that Rosher was purporting to act on behalf of the shareholders before October 14. He only made a proposition, stating that he would see whether he could get the shareholders to accept it.

On the true view of *Marsh v. Joseph*,⁸ the appellants cannot succeed on the point of adoption or ratification. In *Lloyd v. Grace, Smith & Co.*⁹ the fraudulent person was the servant of the solicitor held liable.

It is conceded that, should this appeal succeed, the deduction of £600 from the amount of the damages by Barry J., because of the resale by Cereal Manufacturing Co. (Chelsea) Ltd. of the shares acquired by it, cannot be supported.

Conolly Gage following. Barry J. founded on the view that the fraudulent misrepresentation continued up till the time when the contract was signed making the principal liable. But the tort of deceit is no different from any other tort in that there are two essential ingredients, an illegal act and injury flowing from that act. Deceit is not actionable per se. It is different from other torts in that often a considerable interval elapses between the illegal act and the damage flowing from it—between *injuria* and *damnum*. During that time there is always an obligation on the tortfeasor to put right his illegal act and prevent anyone being hurt or incurring loss by reason of it. Thus, if a negligent packer

⁷ [1901] A.C. 240; 17 T.L.R. 527. ⁹ [1912] A.C. 716.

⁸ [1897] 1 Ch. 213.

packed a dangerous thing like an explosive in an otherwise innocent parcel and posted it to Australia and afterwards remembered his negligent act, he would be under a duty to prevent the recipient being injured. The position is the same in the case of deceit. The tort is complete when the fraudulent misrepresentation is made, but a duty to prevent injury resulting from it continues. It was assumed in the example that at the time of the negligent act the packer was acting in a business of his own. But if while the parcel was in transit his business was taken over by someone else, whose employee the packer became, it could not be said, if the explosive went off, that the new owner was responsible for the negligent act of the packer performed before he came into his service and not communicated to him. See also *Arkwright v. Newbold*,¹⁰ *per* Cotton and James L.JJ.

Gardiner Q.C. in reply. The first question posed by counsel for the respondents does not accurately express the point. The real question is: did the shareholders appoint Rosher their agent on October 14, 1948, and what was the scope of his authority?

In an action for fraud there is a special onus on the plaintiff to establish it, because fraud is also a criminal offence, but there is no special onus to establish vicarious liability because the principal so liable is not guilty of a criminal offence.

The value of the minute of the meeting of October 14 to the respondents is to show that Rosher was not their authorized agent before then, but there is evidence of the same fraud after that date as before.

There being a duty on the principals in such circumstances to correct a misstatement, the failure to discharge it may be either fraudulent or innocent. If it is the latter the remedy is rescission of the contract, as in *With v. O'Flanagan*.¹¹

Spencer Bower on Actionable Misrepresentation, 2nd ed., pp. 115-6, deals with *Arkwright v. Newbold*,¹² relied on by the respondents.

A fraudulent misrepresentation is not in itself a criminal offence or a cause of action. To be so it must be made to induce a contract, and by doing so it must result in damage. The doctrine of the continuing representation is peculiarly applicable here.

The headnote in *Keighley, Maxted & Co. v. Durant*,¹³ relied on by the respondents, has given rise to misconception: see *per* Lord Macnaghten and Lord Robertson.

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¹⁰ (1881) 17 Ch.D. 301, 325, 329.¹¹ [1936] Ch. 575, 584.¹² 17 Ch.D. 301.¹³ [1901] A.C. 240, 246, 259.

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*Marsh v. Joseph*¹⁴ shows that there can be adoption or ratification if there is either full knowledge of the acts done or if there is a clear inference that the principal was adopting the acts of the supposed agent, whatever their nature or culpability. It is not necessary for the plaintiffs here to show that the shareholders had reason to be suspicious of Roshier; they have taken the benefit of his acts without making any inquiry at all, and that is enough to establish ratification. An essential ingredient in Roshier's fraud was keeping silence as to his previous misrepresentations, and as it was continued after the establishment of the agency his principals were liable.

*Union Bank of Australia Ltd. v. McClintock*¹⁵ illustrates the difficulties of ratification.

Their Lordships took time for consideration.

April 1. LORD OAKSEY. My Lords, this is an appeal from a judgment of the Court of Appeal (Lord Goddard C.J., Morris and Romer L.JJ.), reversing the judgment of Barry J. in an action for fraud.

The appellants, who were plaintiffs in the action, are four Czechoslovakians and a company who were engaged in the year 1947 in the food trade. In that year Mr. Fischer, on their behalf, applied to the defendant Roshier, who was the managing director of a company called Nutrifood Products Ltd. (hereinafter called "the company") with the object of acquiring the shares in the company, but Roshier at that time, since the company was then prospering, refused to enter into negotiations. In the year 1948 the company began to lose money and Roshier then approached Mr. Fischer with a view to his acquiring the shares of the company on his own behalf and on behalf of his associates, who are the plaintiffs. It is admitted by the respondents that throughout these negotiations, which culminated in the sale of all the shares in the company to the plaintiffs, the defendant Roshier never disclosed that the accounts of the company, though based upon figures which were accurate in themselves, were to his knowledge the result of fraudulent and dishonest trading. The company was engaged in the manufacture and sale of synthetic cream under licence from the Ministry of Food, and under this licence the cream had to be prepared in accordance with a formula which laid down the percentage of margarine which must be used. The company, under Roshier's management at all material times,

¹⁴ [1897] 1 Ch. 213.

¹⁵ [1922] 1 A.C. 240, 247.

increased the amount of synthetic cream manufactured and sold by the introduction of water and by the disregard of the formula.

Relying upon the figures in the company's accounts, the plaintiffs and Rosher had reached a point in the negotiations when Rosher determined to bring the matter before his fellow directors and before a general meeting of the company. After this meeting on October 14, 1948, a minute was drawn up in the following terms: "The chairman reported that the directors had received " a proposition with regard to the sale of the whole of the company's shares. At the present time great difficulties were being " encountered owing to the restricted supplies of raw material " with a consequent restriction in output resulting in losses being " incurred by the company. There were no prospects in the " immediate future of the allocation of raw materials being " increased. The proposition referred to had been received from " Economic Utilities Ltd. whereby that company would purchase " from the shareholders of Nutrifood Products Ltd. their preference " shares for 35s. per share and their ordinary shares for 15s. per " share. This matter was discussed very fully and it was agreed " that Mr. Rosher, who had already been in negotiation with " Economic Utilities Ltd., should take the matter up further with " that company with a view to completing the transaction on the " above basis.

" (Sgd.) F. E. Rosher. 30/11/48."

Upon the true interpretation of this minute there has been much argument, to which I will return later.

Thereafter Rosher continued the negotiations and saw the plaintiffs, Mr. Briess, Mr. Fischer, Mr. Jedlin and Mr. Pintus, and it was ultimately agreed, on or about November 4, 1948, that the plaintiffs would purchase all the shares in the company for £12,000. Two meetings undoubtedly took place between the plaintiffs and Rosher towards the end of October, probably on October 20 and 23, and at one of these meetings Mr. Briess asked Rosher explicitly whether the company had a licence and whether they had a fat allocation, and Rosher answered in the affirmative and explained that a minimum output of 250 gallons per week was essential to a profit, whereas, according to Barry J.'s finding, the company could not produce more than 150 gallons if they had adhered to the Ministry's formula. When Rosher's fraud was discovered the plaintiffs applied, on March 1, 1950, to Sir C. J. H. McRea for redress, but liability was denied and this action was then begun. Sir C. J. H. McRea died on June 19, 1951.

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At the trial, at the close of the case for the plaintiffs, counsel for the defendant executors elected to call no evidence and submitted that there was no case for them to answer. The trial judge overruled the submission, accepting the contentions made on behalf of the plaintiffs as to the basis of those defendants' liability, and holding: (i) that fraud had been committed by Rosher after October 14, 1948, and thus during the period when he had been authorized to act as agent on behalf, *inter alios*, of the deceased; (ii) that the deceased, *inter alios*, had accepted Rosher's negotiations effected prior to October 14, 1948, in such circumstances as to assume responsibility for Rosher's fraud so far as previously committed.

The action then proceeded, and on July 31, 1952, Barry J. held: (1) that Rosher had been guilty of fraud by misrepresentation and concealment whereby the plaintiffs had been induced to enter into the said agreement; (2) that the defendant executors as representing the deceased were liable to the plaintiffs for the fraud of Rosher on the grounds contended by the plaintiffs; (3) that by reason of the said fraud the plaintiffs had suffered loss and damage to the amount of £6,000 but that the defendants were entitled to a deduction of £600 from this sum on account of the fact that the plaintiff Cereal Manufacturing Co. (Chelsea) Ltd., who had contributed £4,800 of the purchase price of £12,000 paid to the shareholders of the company, in respect of which the company had taken transfers of 1,905 preference shares of £1 each and 1,904 ordinary shares of 1s. each, had in fact sold such shares in August, 1949, prior to the discovery of the fraud, for the sum of £3,000.

Barry J. accordingly ordered that judgment be entered for the plaintiffs against Rosher and the defendant executors for the sum of £5,400 with costs other than those incurred by the joinder of the plaintiffs Cereal Manufacturing Co. (Chelsea) Ltd. and that the said sum of £5,400 be apportioned between the plaintiffs respectively, as to the plaintiff Briess £1,500, as to the plaintiff Pintus £900, as to the plaintiff Strauss £450, as to the plaintiff Fischer £750, and as to the plaintiffs Cereal Manufacturing Co. (Chelsea) Ltd. £1,800 (which last sum represented £2,400 less £600 deducted). Thereafter the trial judge heard and disposed of the third party proceedings in which the defendant executors claimed contribution from other former individual shareholders. At the conclusion of such proceedings judgment was entered in favour of the defendant executors against such third parties for a

sum of money and costs in the case of each third party proportionate to the value of his transferred shareholding in the company related to the price paid for the shares in that company by the plaintiffs upon the ground that Rosher, having acted as agent for such third parties as well as for the said deceased, such third parties were liable to make contribution as aforesaid towards the liability of the defendant executors under the judgment in favour of the plaintiffs.

The defendant executors appealed to the Court of Appeal on the grounds that the trial judge was wrong in law in holding that the deceased, and through him his estate, was liable for the fraud of Rosher, and that there was no evidence on which the trial judge could so hold. Rosher did not appeal against the judgment and order. The plaintiffs cross-appealed against the judgment and order of the trial judge in so far as the sum of £600 had been deducted from the damages.

On February 17, 1953, the Court of Appeal (Lord Goddard C.J., Morris and Romer L.JJ.) allowed the appeal of the defendant executors, holding: (1) that there was no continued or repeated fraud committed by Rosher in showing to the plaintiffs balance sheets of the company and allowing the plaintiffs to remain under the impression that the figures shown in such accounts related to trading which he, Rosher, had fraudulently represented the company to have been conducting lawfully and in a material which could be lawfully sold; (2) that the doctrine of ratification had no application to the circumstances of the case on the ground that the shareholders (including the said deceased) knew, and could know, nothing of Rosher's fraud; (3) that the authority given to Rosher at the meeting of October 14, 1948, was merely to accept an offer in stated terms for the purchase of the shares in the company and was not an authority to Rosher on behalf of the shareholders to negotiate a sale.

At the hearing in your Lordships' House Mr. Salmon, on behalf of the respondents, contended (1) that the shareholders did not ratify Rosher's agency at the meeting of October 14, 1948; (2) that the minute of that meeting showed on its true interpretation that Rosher was not given authority to make any representations on the shareholders' behalf; (3) that in fact Rosher made no misrepresentation after October 14, and that his previous misrepresentations did not continue or have any continued effect after October 14, 1948, when he became the agent of the shareholders.

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My Lords, I think that on the authorities, and particularly on the judgment of the Court of Appeal in *Marsh v. Joseph*¹ it cannot be said that the shareholders ratified Rosher's agency up to October 14, 1948, as it was not proved that they had full knowledge of all the facts or that there is sufficient evidence to make it clear that they intended to ratify whatever he had done.

But, on the other hand, I am of opinion that, on the true interpretation of the minute of the general meeting, it is clear that Rosher was appointed on October 14, 1948, agent on behalf of all the shareholders of the company to negotiate the sale of their shares, and that in such circumstances the shareholders are responsible for any fraudulent representations he made in the course of those negotiations.

It was argued that there was no satisfactory evidence that he made any further misrepresentations after October 14, 1948, but even upon that assumption I am of opinion that in negotiating from the outset on the basis that the company's accounts which he put forward represented the true position of the company Rosher continued to make that fraudulent representation up to the time the contract was completed. It is not a case in which an innocent misrepresentation has been forgotten or a truthful representation has been changed into an untruthful representation by a change of circumstances. From the first and throughout the negotiations Rosher knew perfectly well that the plaintiffs were negotiating in the belief that the accounts put forward by him represented an authorized and legitimate business and his fraud continued from minute to minute after October 14, 1948, up to the time when he secured the completion of the contract (*cf.* Spencer Bower on Actionable Misrepresentation, 2nd ed., pp. 77-8, *Smith v. Kay*,² *Meluish v. Milton*³).

Apart, however, from this consideration I am of opinion that, having regard to the attitude of counsel for the defendants at the trial (see the cross-examination of Mr. Briess at pp. 46, 47, 48 and 49 of the appendix, Part II, to the printed case on the appeal to the House of Lords, and the examination of Rosher, p. 91 D-G) and the evidence of Mr. Briess, there was sufficient evidence to show that Rosher actually made further express misrepresentations after October 14, 1948—in particular in his admitted representation that 250 gallons was a minimum for profitable working.

For these reasons I am unable to agree with the judgment of

¹ [1897] 1 Ch. 213; 13 T.L.R. 136.

³ (1876) 3 Ch.D. 27, 35.

² (1859) 7 H.L.C. 750, 769.

the Court of Appeal, and I move your Lordships that the appeal be allowed and the judgment of Barry J. be varied by increasing the damages to £6,000 and the apportioned share thereof of the Cereal Manufacturing Co. (Chelsea) Ltd. to £2,400. The appellants will have the costs here and below.

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LORD REID. My Lords, the business of Nutrifood Products Ltd. was the manufacture and sale of synthetic cream. To manufacture this substance they had to have a licence from the Ministry of Food and an allocation of raw materials. They obtained the licence on condition that they manufactured the cream according to a formula approved by the Ministry. The company's undertaking was small and the whole business was conducted by Mr. Rosher, the managing director. From the outset Mr. Rosher disregarded the formula and added much more water to the cream than he was permitted to do. This was a criminal offence, but it produced substantial profits which could not have been made by lawful means. None of the other directors or shareholders were aware of this and it is not suggested that they were culpable in any way. Mr. Rosher concealed his offence from the Ministry by making false returns.

When it became difficult to carry on this system Mr. Rosher sought to sell the business. Without informing his co-directors he approached the appellants, who he knew were willing to buy the business. He told them truthfully that the company had a licence and an allocation of raw materials and he showed them accounts which were accurate, but he concealed from them the fact that he had been acting illegally and that, if he had complied with the conditions of the licence, the total output of cream would have been so much smaller that the profits could not have been made. It is not disputed that the false picture which he thus presented to them was a fraudulent misrepresentation.

When negotiations had reached the stage of the appellants provisionally agreeing to a price if all the shares in the company were transferred to them, Mr. Rosher put the matter before the other directors and then before the shareholders at meetings at which the late Sir Charles McRea presided on October 14, 1948. I shall have to consider later what occurred at those meetings. Then, on November 2, the appellants, through Economic Utilities Ltd., a company controlled by them, offered to buy all the shares for a total price of £12,000, and on November 12, Mr. Rosher accepted that offer. All the shareholders signed transfers of their shares in favour of the appellants and the sale was duly

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The appellants later discovered the fraud and after some correspondence, on April 15, 1950, they raised the present action against certain of the former shareholders, including Sir Charles McRea, for £12,000 damages. The only respondents now are the executors of Sir Charles McRea, who died after the raising of this action and who was the chairman and largest shareholder in the company, and if this appeal succeeds it is agreed that the appellants are entitled to judgment against the respondents for £6,000, being the difference between the price paid by the appellants, £12,000, and the true value of the shares which they received, which was £6,000. The ground of action is that in completing the transaction Mr. Rosher acted as the agent of Sir Charles McRea and the other shareholders and that all the shareholders who authorized him to act as their agent are jointly liable for the damage caused to the appellants by his fraud.

The first question to be decided is the extent of the authority conferred on Mr. Rosher by the shareholders. The only authority which they gave to him was given at the general meeting of the company held on October 14, 1948. No doubt it was convenient to discuss and settle this matter at the general meeting, but the arrangements which the shareholders made with Mr. Rosher were not company business, and therefore the minutes of the meeting were not, strictly speaking, the appropriate place to record these arrangements. Nevertheless, the minutes of this meeting are the only evidence in this case of what took place at the meeting, and it has been accepted throughout that the nature and extent of the authority which the shareholders then conferred on Mr. Rosher are to be determined by a construction of the minutes. The relevant part of the minutes is in these terms: "The chairman reported that the directors had received a proposition with regard to the sale of the whole of the company's shares. At the present time great difficulties were being encountered owing to the restricted supplies of raw material with a consequent restriction in output resulting in losses being incurred by the company. There were no prospects in the immediate future of the allocation of raw materials being increased. The proposition referred to had been received from Economic Utilities Ltd. whereby that company would purchase from the shareholders of Nutrifood Products Ltd. their preference shares for 35s. per share and their ordinary shares for 15s. per share. This matter was discussed very fully and it was agreed that

“ Mr. Rosher, who had already been in negotiation with Economic Utilities Ltd. should take the matter up further with that company with a view to completing the transaction on the above basis.”

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The respondents say that the true meaning of this minute is that the shareholders only authorized Mr. Rosher to accept the sum of money which was being offered and that they gave him no authority to do anything else and, in particular, no authority to make any representations on their behalf. This was the interpretation accepted by the Court of Appeal. Lord Goddard C.J. said⁴: “ I base my judgment on the ground that, so far as I can see, the minute of the general meeting in October does not give Rosher authority, or purport to give him authority, to negotiate on behalf of the company. It gave him authority to accept what was being offered, a sum of money which he said that he could get for these shares.”

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My Lords, I am unable to accept that interpretation. The minute states that the directors had received a “ proposition.” I do not think that “ proposition ” here means a firm offer. The minute of the directors’ meeting held earlier on the same day shows that this “ proposition ” was submitted to the directors by Mr. Rosher. It states that Mr. Rosher “ outlined a proposition which had been made to him by Economic Utilities Ltd.” and that it was decided that this proposition should be placed before the shareholders for their consideration. Mr. Rosher had been negotiating with the appellants, but in fact he had not then received any firm offer either from them or from Economic Utilities Ltd. His earlier conduct shows that he would not have been deterred from making any statement which suited him because he knew it to be untrue, but it appears to me to be improbable that he would have told the shareholders that he had a firm offer, because if by any chance the negotiations had later broken down his false statement would have put him in a difficult position with the shareholders. If he did not say that a firm offer had been received, then the natural course for the shareholders to take was to authorize him to do all that was necessary to complete the transaction, and as I read the last sentence of the minute that is in fact what was done. Authority to “ take the matter up further with that company with a view to completing the transaction on that basis ” appears to me clearly to include authority to make such further statements and representations and to give such answers to any questions by

⁴ [1953] 2 Q.B. 218, 223-4; [1953] 1 All E.R. 717.

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If that be so, and if thereafter Mr. Rosher made any false and fraudulent representations which brought about the sale, then it was not disputed that the appellants must succeed. But the evidence on this matter is not very satisfactory. There is evidence that Mr. Rosher made such representations to Mr. Briess, one of the appellants, after October 14, but this does not appear to have been treated as a vital matter at the trial, and the findings of Barry J. on the subject are not very specific. I am, therefore, not prepared to decide the case on this ground, and I shall consider it on the footing that all the relevant misrepresentations were made by Mr. Rosher before October 14.

The respondents argue that a principal can only be vicariously liable for acts done by his agent after he had become agent, and therefore the shareholders cannot be liable for damage caused by fraudulent misrepresentations made by Mr. Rosher at a time when he had no authority to act for them any more than they would be liable in respect of fraudulent misrepresentations made by some third person with whom they never had any connexion at all. The general principle of vicarious liability for fraudulent misrepresentations is now well settled. I shall quote two short passages from the speech of Lord Macnaghten in *Lloyd v. Grace, Smith & Co.*⁵ Lord Macnaghten quoted from Lord Blackburn's speech in *Houldsworth v. City of Glasgow Bank*⁶ this passage, dealing with the case of *Barwick v. English Joint Stock Bank*⁷: "The substantial point decided was, I think, that an innocent "principal was civilly responsible for the fraud of his authorized "agent, acting within his authority, to the same extent as if it "was his own fraud." Then Lord Macnaghten added⁸: "That, "my Lords, I think is the true principle." Then Lord Macnaghten quoted⁹ with approval, the following passage from the judgment of Bramwell L.J. in *Weir v. Bell*¹⁰: "every person "who authorizes another to act for him in the making of any "contract, undertakes for the absence of fraud in that person in "the execution of the authority given, as much as he undertakes "for its absence in himself when he makes the contract." That passage from the judgment of Bramwell L.J. was also quoted with approval by Viscount Haldane L.C. in *Mair v. Rio Grande*

⁵ [1912] A.C. 716, 735; 28 T.L.R. 547.

⁶ (1880) 5 App.Cas. 317, 339.

⁷ (1867) L.R. 2 Exch. 259.

⁸ [1912] A.C. 716, 736.

⁹ Ibid. 737.

¹⁰ (1878) 3 Ex.D. 238, 245.

Rubber Estates Ltd.,¹¹ and I might add one sentence from the speech of Lord Moulton in that case¹²: "Now, it is elementary law that no person can take advantage of the fraud of his agent."

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My Lords, I find it impossible to reconcile those general statements of the law with the contention that a principal can disclaim responsibility for fraudulent misrepresentations made by his agent which, though made before the agency commenced, to the agent's knowledge continued to influence the other party after his appointment as agent and finally induced the other party to enter into the contract which the agent had been authorized to make and did make on behalf of his principal. The misrepresentations were continuing representations intended to induce the other party to make the contract, and when that party made the contract to his detriment, a cause of action arose, and in my opinion it arose against both the agent and the principal. The agent continued to be fraudulent after he was appointed. It was his duty, having made false representations, to correct them before the other party acted on them to his detriment, but he continued to conceal the true facts. Sir Charles McRea "under-took for the absence of fraud" in Mr. Roshier in the exercise of the authority given to him. But Mr. Roshier acted fraudulently while executing that authority and in making the contract, and on that ground I am of opinion that this appeal should be allowed.

I might add that counsel for the respondents stressed the hardships that would result in this and other cases if the law is so applied, but the hardships which would result if the law were otherwise would be no less. If this remedy were not available to the appellants, counsel was unable to suggest any other form of remedy which would have been available to them, and if no remedy was available to the appellants in this case, then the hardship to them is obvious, but I do not think that cases of this kind can or should be decided by balancing actual or possible hardships.

My Lords, my noble and learned friend, Lord Asquith of Bishopstone, is unable to be present this afternoon. He asks me to say that he has read the speech which I have just delivered and that he agrees with it.

LORD TUCKER. My Lords, it is not in dispute that the sale of the shares in Nutrifood Products Ltd. was induced by the fraud

¹¹ [1913] A.C. 853; 29 T.L.R. 692. ¹² [1913] A.C. 853, 872-3.

H. L. (E.) of one Rosher who was a defendant in the action. The nature of the fraud was that he represented that the profits of that company had been made by lawful trading whereas, as he well knew as managing director of the company, the profits had been made as a result of the manufacture of greatly larger quantities of artificial cream than could have been manufactured if the formula approved by the Ministry of Food had been adhered to as required by the licence granted by the Ministry. He never made an express representation to this effect, but the trial judge, Barry J., found that he had, by the production of the company's balance sheets and his conduct throughout the negotiations, impliedly so represented.

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The question for decision in this appeal is whether the personal representatives of Sir Charles McRea deceased, whose shares were sold as a result of this fraudulent misrepresentation, are liable to pay damages. The answer depends upon whether Rosher was at any stage prior to November 12, 1948, on which date the contract for the sale of all the shares in Nutrifood Products Ltd. to Economic Utilities Ltd. as agents for the appellants was concluded, the agent for the shareholders, including Sir Charles McRea, to negotiate the sale and make representations on their behalf.

Rosher had been tentatively approached with regard to a possible sale of the shares of Nutrifood Products Ltd. by one of the appellants, Mr. Fischer, in 1947, but nothing resulted therefrom. In the summer of 1948 Rosher re-opened the question by inviting Fischer to lunch with him at his club. There were further interviews with some of the other appellants and by October 14, 1948, the negotiations had reached a stage at which Rosher was in a position to report to the shareholders and ascertain their intentions. Up to this point they had no knowledge of the discussions and it is not in dispute that prior to October 14 Rosher had no authority from Sir Charles McRea or any other shareholder to make any representation on their behalf. He had ascertained that the appellants were disposed to pay 35s. per share for the preference shares and 15s. for the ordinary shares, but the trial judge has found that he had not by this date obtained a firm offer at these prices and there was no evidence that at the annual general meeting of the company on October 14 he ever stated that he had obtained a firm offer.

As to what took place at this meeting the parties were content to rely at the trial on the minutes of the company and no evidence, apart from Rosher, was called by either side. It is

true that Rosher in answer to questions by counsel for Sir Charles McRea's representatives stated that by that time the price had been agreed and the negotiations were concluded, but this was not strictly accurate since no firm offer was then in existence and in fact the offer by Economic Utilities Ltd. six days after the meeting was "subject to contract."

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The nature of Rosher's authority can therefore only be ascertained from a perusal of the minutes. The relevant portions of the minute of the director's meeting at 12 o'clock on October 14 and of the company's annual general meeting at 2.30 p.m. on the same day are as follows:—

Directors' Meeting

"Mr. Rosher outlined a proposition which had been made to him by Economic Utilities Ltd. whereby that company would purchase from the shareholders of Nutrifood Products Ltd. their preference shares for 35s. per share and their ordinary shares for 15s. per share. This was discussed very fully and in view of the difficulties being encountered in consequence of the restricted supplies of raw material it was decided that the above proposition should be placed before the shareholders at the annual general meeting for their consideration."

Annual General Meeting

"The Chairman reported that the directors had received a proposition with regard to the sale of the whole of the company's shares. At the present time great difficulties were being encountered owing to the restricted supplies of raw material with a consequent restriction in output resulting in losses being incurred by the company. There were no prospects in the immediate future of the allocation of raw materials, being increased. The proposition referred to had been received from Economic Utilities Ltd. whereby that company would purchase from the shareholders of Nutrifood Products Ltd. their preference shares for 35s. per share and their ordinary shares for 15s. per share. This matter was discussed very fully and it was agreed that Mr. Rosher, who had already been in negotiation with Economic Utilities Ltd., should take the matter up further with that company with a view to completing the transaction on the above basis."

Barry J. held that the authority thus conferred on Rosher was not limited to accepting an offer to purchase and arranging the necessary transfers but that there being then no binding offer in existence which Rosher could accept forthwith, he was given

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authority to take the matter up further with the prospective purchasers and to make any statements concerning the company's business which might be required in order to induce them to enter into a binding contract.

The Court of Appeal, on the other hand, have construed the minute as conferring only the more limited authority, viz., to accept what was being offered, i.e., a sum of money. My Lords, I am unable to take such a limited view of the agent's authority. It would have been perfectly simple to say in terms that he was to "accept the offer which had been received." Instead, the expressions "a proposition with regard to the sale," "whereby "that company would purchase," "Mr. Rosher, who had already "been in negotiation," "should take the matter up further with "the company," "with a view to completing the transaction on "the above basis" are used. This language is consistent with the known facts that no firm offer capable of acceptance so as to constitute a binding contract existed and that further negotiations were in fact required to bring this about. But apart from these facts the language of the minute is, I think, in such general terms as to preclude the more limited construction.

My Lords, if, as I think, this is the proper construction of the minute, Rosher was from that time until the completion of the contract on November 12 the agent of Sir Charles McRea, *inter alios*, to complete the negotiations and make a contract. He knew more about the business of the company than anyone else and would clearly have authority to answer all questions relevant thereto and to make any statements in connexion therewith necessary to bring about the desired result.

I do not think that the judge's judgment can fairly be read as containing a specific finding that Rosher at any time after October 14 expressly made any misrepresentation, but in his preliminary judgment given at the close of the plaintiffs' case on a submission of "no case" by counsel for the present respondents he dealt with the respondents' liability on the basis that the previous misrepresentations of Rosher were to be regarded as continuing down to the moment when the appellants' agents acted on them. He said: "I am quite satisfied that the representations made by Mr. Rosher concerning the affairs of Nutrifood "Products, whether made before or after October 14, were continuing representations and remained continuing representations "until the plaintiffs or their agents, Economic Utilities Ltd., acted "upon them by entering into a binding agreement to purchase

“ these shares in the beginning of November. These representations, being continuing representations, the law regards them as “ being repeated from minute to minute during the whole period “ between the time the representations were made and the time “ when they were finally acted upon.” A little later he said: “ It was suggested at an early stage of the argument that the “ duty to make a disclosure as to the affairs of the company and “ to rectify misstatements which had been made about those “ affairs was a duty which fell only upon Mr. Rosher in his “ personal capacity, because it was his misrepresentations made “ in the early stage of the negotiations which caused that duty “ to arise. . . . I cannot take the view that it was merely a “ personal responsibility falling upon Mr. Rosher, whether before “ or after October 14. After October 14, as I have said, I am “ satisfied that Mr. Rosher was acting on behalf of the share- “ holders, and with their authority, and that if he allowed these “ representations . . . to continue right up to the date of the sale, “ he did so as from October 14 as agent for the named defendants, “ among others, and they are, unfortunately for them, vicariously “ responsible for that tort.”

My Lords, this is, in my opinion, a completely accurate statement of the law. It was contended by counsel for the respondents that when once the representations were made the wrongful act was complete although no action for damages would lie until the representee suffered damage. He argued that the representations were not continuing but the consequences of the original representation continued, and accordingly, provided that the representor was not the agent of the respondents when the original representation was made, they could not be held responsible because the consequences of that representation took effect at a time when the representor had become their agent.

No authority for this proposition was cited, and it is, in my view, founded upon error. The tort of fraudulent misrepresentation is not complete when the representation is made. It becomes complete when the misrepresentation—not having been corrected in the meantime—is acted upon by the representee. Damage giving rise to a claim for damages may not follow or may not result until a later date, but once the misrepresentation is acted upon by the representee the tortious act is complete provided that the representation is false at that date. If false when made but true when acted upon there is no misrepresentation. In Spencer Bower on Actionable Misrepresentation, 2nd ed., p. 77,

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article 73, it is stated: "It is commonly said that the representation must be shown to have been false when made. But this is not quite correct. The only real issue is—was it true or false when it was acted upon?" In Halsbury's Laws of England, 2nd ed., Vol. XXIII, p. 29, para. 44, it is stated: "Where there is an appreciable interval between the two dates above mentioned [i.e., date when made and date when acted upon], and the representation relates to an existing state of things, the representor is deemed to be repeating his representation at every successive moment during the interval, unless he withdraws or modifies it by timely notice to the representee in the meantime." I do not think the accuracy of these statements can be challenged. It is true that there does not appear to be any express authority which can be quoted as an example of the application of this principle to a case of principal and agent where the agency commences after the making of a representation which is allowed by the agent to continue uncorrected with knowledge of its falsity until acted upon. I agree, however, with Barry J., that the duty of the agent, who has made the misrepresentation, to correct it cannot be regarded as only a personal obligation. If he has in the meantime been appointed agent with authority to make representations for the purpose of inducing a contract he, in his capacity as agent, is by his conduct repeating the representations previously made by him. This is more particularly the case where the misrepresentation results from silence with regard to matters which if revealed would have rendered false statements which standing by themselves were literally true. The present is such a case. Having given information with regard to the profits of the company Rosher's silence both before and after October 14 as to the nature of those profits rendered that information false. His fraud was a continuing fraud which became tortious when acted upon by the appellants' agents on November 12, 1948.

The judge awarded the appellants £5,400 damages. It was contended by counsel for the appellants and agreed by counsel for the respondents that if the appellants were entitled to succeed the damages should have been £6,000, of which sum the apportioned share of the Cereal Manufacturing Co. (Chelsea) Ltd. would be £2,400.

For the reasons stated above I would allow the appeal and vary the judgment of Barry J. by increasing the damages to £6,000 and the apportioned share thereof of the Cereal Manufacturing Co. (Chelsea) Ltd. to £2,400.

LORD COHEN. My Lords, it is common ground between the parties that prior to October 14, 1948, Mr. Rosher had no authority to act in relation to the sale of the shares in Nutrifood Products Ltd. (to which company I shall refer hereafter as "the company") on behalf of any of the shareholders of the company other than himself. It is also common ground that at the annual general meeting of the company held on that day the shareholders conferred on him some authority. The first question which your Lordships have to determine is as to the extent of that authority. No shareholder in the company other than Mr. Rosher was called as a witness at the trial. The parties treated the minutes of that meeting, which were signed by Mr. Rosher, as being a correct record of the proceedings thereat.

In the Court of Appeal the Lord Chief Justice, with whom Morris L.J. and Romer L.J. agreed, construed that minute as not recording any authority to negotiate a sale on behalf of the shareholders but as recording only authority to accept an offer which had already been made. Had I been able to construe the minute in this sense I should, I think, have agreed with the decision of the Court of Appeal, but I am unable so to construe it. The language of the concluding sentence of the minute—"It was agreed that Mr. Rosher, who had already been in negotiation with Economic Utilities Ltd., should take the matter up further with that company with a view to completing the transaction on the above basis"—seems to me inconsistent with so limited an authority as that for which the respondents contend. Had that been the intention it would have sufficed to record that it was agreed that Mr. Rosher should accept the offer on behalf of all the shareholders.

It is plain that prior to the meeting Mr. Rosher had in fact received no definite offer from the proposed purchasers and there seems no reason why he should have lied to the shareholders on this point. The use of the word "proposition" with regard to the sale of the whole of the company's shares suggests that he told the shareholders that the matter was still in the stage of negotiation, and the concluding sentence which I have already quoted confirms that view. If that be so, I think the form of the minute necessarily involves that Mr. Rosher was authorized by the shareholders to give on their behalf such information as to the business of the company as the proposed purchasers might require before they would turn their proposition into a definite offer.

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On this basis Mr. Gardiner argued that the shareholders were liable for Mr. Rosher's admittedly fraudulent misrepresentations on the ground (a) that they were repeated after October 14, 1948, and before the contract became binding on November 12, 1948, or alternatively, (b) that the misrepresentations, though made before October 14, 1948, were continuing representations which neither Mr. Rosher nor his principals corrected before November 12.

The first of these grounds raises a pure question of fact, and Mr. Salmon did not dispute that if the trial judge had found on evidence that fraudulent misrepresentations had been made between October 14, 1948, and November 12, 1948, the appellants would be entitled to succeed. Unfortunately, there is no clear finding on this point. The judge had first to consider it when ruling on a submission by Mr. Conolly Gage that there was no evidence that the late Sir Charles McRea was responsible in tort for the alleged misrepresentations. In the course of his observations on this submission the judge said: "It is not clear, as "Mr. Gardiner has conceded, whether or not any specific statements were made about the company's business after that date, "or whether the relevant balance sheets and accounts of the "company were shown to the plaintiffs, or any of them, before or "after that date." Had the matter rested there, the appellants would have failed to discharge the onus which rested on them of proving a fraudulent misrepresentation after October 14, 1948.

The judge had, however, to consider the matter again when giving judgment at the conclusion of the hearing. In the course of his observations he said: "Mr. Briess was, of course, also "interested in these matters, and he tells me (and I accept "his evidence as to this—indeed, there is no real dispute about "it) that he was concerned about whether this company had a "licence to produce this cream from the Ministry of Food. He "knew that a licence was necessary and he was concerned to "know whether or not the company had the necessary allocation "of materials, and he raised both those points with Mr. Rosher "and Mr. Rosher confirmed that the company had a licence and "that it had the necessary allocation of materials. Throughout "the profit figures that were shown on the company's accounts "for the three years I have mentioned were treated as being "the profits earned by the company in respect of their trading "activities during those three annual periods. Shortly before "the final bargain was made, Mr. Briess and Mr. Fischer (and, "I think, also Mr. Pintus) all went out to visit the Nutrifood

“ factory at Acton. There they saw Mr. Rosher and saw the
 “ manufacturing process going on. They did not go into any
 “ details on that occasion, but Mr. Rosher met these three
 “ gentlemen (some of them for the first time) and that interview
 “ is said to have taken place somewhere about October 20,
 “ 1948.” This reference to October 20, 1948, is, I think, a
 mistake for October 23, 1948. This extract leaves it in doubt
 when the questions were asked by Mr. Briess, but there is some
 evidence to support the view that no interview between
 Mr. Rosher and Mr. Briess had taken place before October 20,
 1948. Later in his judgment, while dealing with the question
 whether there was any false representation, the judge refers to
 a statement which Mr. Rosher says he made to Mr. Briess at
 an interview in Mr. Briess’s office in October shortly before
 Mr. Briess’s visit to the company’s factory. That statement
 was to the effect that a minimum output of 250 gallons per
 week was essential before the business could show any margin
 of profit. From some of the evidence it seems probable that
 this interview at Mr. Briess’s office took place on October 20,
 1948. The judge points out that a production of 250 gallons
 per week must, to Mr. Rosher’s knowledge, have been utterly
 impossible except by a watering down of the mixture to such
 an extent that the fat content was half or less than half of
 the minimum required by the Ministry. He concludes his
 observations on that part of the case by saying: “ With all that
 “ knowledge, it seems to me, to represent that the company was
 “ operating under a licence granted by the Ministry (a licence
 “ in the terms I have indicated) was a false representation. I
 “ am forced to the conclusion, in all the circumstances of this
 “ case, that that false representation was made knowingly, with
 “ a view to inducing these gentlemen (the plaintiffs in this case)
 “ and the company now associated with them as co-plaintiffs, to
 “ purchase the shares in this company.”

He then proceeds to consider the question of the liability of
 the other shareholders for Mr. Rosher’s fraudulent misrepresen-
 tations. After referring to his decision on the submission and
 saying that he need not repeat what he said then, he continued:
 “ I cannot see that Mr. Rosher’s evidence has carried the matter
 “ any further than the point to which it has been carried at the
 “ close of the plaintiffs’ case. I am bound to say, for the reasons
 “ which I indicated in ruling upon Mr. Gage’s submission, that
 “ I have come to the conclusion that his clients, the represen-
 “ tatives of the late Sir Charles McRea—although no one has

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H. L. (E.) “ suggested that Sir Charles McRea was personally implicated
 1954 “ in any way in these representations which I have found to be
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 v. “ damages which flowed from those fraudulent representations on
 WOOLLEY. “ the ground that the representations, or some of them at some
 Lord Cohen. “ period, were made by Mr. Rosher acting as Sir Charles
 “ McRea’s agent and on his behalf.” This seems to suggest
 that part of the misrepresentations complained of were in fact
 made after October 14, 1948, but having in mind that the onus
 is on the appellants, I should hesitate in the absence of a clear
 finding to decide this case in their favour on this ground. I turn
 therefore to the question of continuing misrepresentation.

Mr. Gardiner relied on a statement of the principle of continuing misrepresentation to be found in Spencer Bower on Actionable Misrepresentation, 2nd ed., p. 3, which reads as follows: “ In any case where there is an interval between the
 “ representation and the alteration of position induced thereby,
 “ the representor is at liberty to withdraw or modify the repre-
 “ sentation at any time during such interval. Unless so with-
 “ drawn or modified, and, if modified, subject only to the
 “ modification, the representation is deemed to be repeated at
 “ each successive moment during the whole of such interval,
 “ and is hereinafter called ‘ a continuing representation.’ ” This
 statement is based on some observations of Lord Cranworth in *Smith v. Kay*,¹³ where he said of a representation in issue in that case: “ It is a continuing representation. The representa-
 “ tion does not end for ever when the representation is once
 “ made; it continues on.” The headnote in the case seems to suggest that Lord Wensleydale doubted the correctness of this statement, but I am unable to find any such doubt expressed in his speech. I respectfully agree with the observation of Lord Cranworth and adopt the statement of principle I have cited from the work of Mr. Spencer Bower.

Mr. Spencer Bower was at that stage, however, dealing with the position as between the maker of the representation and the person to whom it was made. He was not considering the question of the responsibility of a principal for the fraudulent misrepresentation of his agent. I turn therefore to the question whether, on the assumption that the statements from which the fraudulent misrepresentation arises were not repeated after October 14, the respondents are liable for the fraudulent

¹³ 7 H.L.C. 750, 769.

misrepresentation of their agent, or, to be more accurate, for his fraudulent failure to correct the false impression he had made, it being admitted that they were themselves innocent of any fraud.

My Lords, in my opinion, on the facts of this case this question must be answered in the affirmative. Mr. Rosher when he became the agent of the respondents was under the duty as between himself and the appellants to correct the false impression that his misrepresentations had made. He had become the agent of the respondents to complete the negotiations for the sale of their shares as well as his own shares to the appellants. His authority extended to giving the appellants information as to the business of the company. It cannot be denied that if he had made a new fraudulent statement as to that business the respondents would have been liable to the appellants in damages for that fraud. It seems to me necessarily to follow that they must be liable for his fraudulent failure to withdraw or modify the false statement he had already made.

In view of the conclusion I have reached on this point it is unnecessary for me to express any opinion as to whether Mr. Gardiner was right in his alternative submission that by appointing Mr. Rosher their agent on October 14 with the authority I have indicated the shareholders accepted responsibility for the representations he had made before that date.

My Lords, I do not think that the decision of your Lordships in this case will have the widespread consequences which Romer L.J. feared; for the difference between your Lordships and the Court of Appeal turns not on any question of law, but on the view your Lordships have formed as to the extent of the authority conferred on Mr. Rosher at the meeting on October 14.

For the reasons I have given I would allow the appeal with costs here and below. In view of the admission by Mr. Salmon that he cannot support the deduction of £600 which Barry J. allowed because of the resale by the Cereal Manufacturing Co. (Chelsea) Ltd. of the shares acquired by it, I agree that judgment should be entered for the appellants for £6,000 apportioned as stated in the order of Barry J. dated July 31, 1952, save that the amount apportioned to the Cereal Manufacturing Co. (Chelsea) Ltd. should be increased to £2,400.

Appeal allowed.

Solicitors: *Buckeridge & Braune; Woolley, Tyler & Bury.*

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AND

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Apr. 1.

Mines and Minerals—Metalliferous mines—Regulations—Breach of statutory duty—Fall of roof—Caused by slickenside—Duty to make roof secure “so far as may be reasonably practicable”—System of tapping—No propping—Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 23—Metalliferous Mines General Regulations, 1938 (S.R. & O. No. 630), reg. 7 (3).

Factory—Practicability of precautions. “Reasonably practicable.”

The Metalliferous Mines General Regulations, 1938, substituted for the rules originally set out in section 23 of the Metalliferous Mines Regulation Act, 1872, must be read in conjunction with and qualified by the prefatory provision contained in that section (that “the following general rules shall, so far as may be reasonably “practicable, be observed”); and accordingly the duty imposed by regulation 7 (3) of the regulations of 1938, which requires that “the “roof and sides of every travelling road, outlet and working place “shall be made secure,” is fulfilled if everything has been done which it was “reasonably practicable” to do to make them secure.

An employee of the company, while working in their gypsum mine, was killed by a fall of roof. Before the work began they had, according to their normal system, regularly inspected the roof by tapping it with a hammer and, when the sound indicated that it was unsafe, it was brought down. The fall was due to the presence of an unusual geological condition known as “slicken-“side,” which had not been found in the mine for 20 years; there was no known means of detecting it before a fall. After the accident hydraulic props were used where slickenside was suspected:—

Held that the company was not guilty of a breach of statutory duty because the death of the deceased was not caused by any failure by them to take “reasonably practicable” steps to secure the roof. The test of what is “reasonably practicable” is not simply what is practicable as a matter of engineering, but depends on a consideration, in the light of the whole circumstances at the time of the accident, whether the time, trouble and expense of the precautions suggested are or are not disproportionate to the risks involved, and also an assessment of the degree of security which the measures suggested may be expected to afford.

Decision of the Court of Appeal [1953] 1 Q.B. 167; [1952] 2 All E.R. 1044 affirmed.

* *Present*: LORD OAKSEY, LORD REID, LORD TUCKER, LORD COHEN and LORD KEITH OF AVONHOLM.

APPEAL from the Court of Appeal (Somervell, Jenkins and Hodson L.JJ.). H. L. (E.)

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This was an appeal from a decision of the Court of Appeal dated November 21, 1952, wholly setting aside the judgment of Jones J., given on the trial of this action at the Leicester Assizes, dated May 28, 1952, whereby judgment was directed to be entered for the appellant, Mrs. Nellie Constance Marshall, in respect of the death of her husband, for the sum of £2,834 5s. 3d., with costs to be taxed between party and party, and ordering that judgment be entered in favour of the respondent company, Gotham Co. Ltd.

The facts, as stated by Lord Reid, were as follows: The appellant's husband, a miner, was killed by a fall of the roof at the place where he was working in the respondents' gypsum mine, and this action was brought to recover damages from them.

The strata in this mine were more or less horizontal. First there was a stratum of gypsum some 6 or 8 feet thick, then above that a thin stratum of marl less than 2 feet thick, then above that a thin and harder stratum of gypsum about 2 feet thick known as ball rock, and above that a thicker stratum of marl some 4 feet thick. The method of mining was first to extract as much as possible of the lower stratum of gypsum. From a main road faces were driven into the gypsum at right angles to the direction of the road. Then, as each face receded, holes were driven at intervals parallel to the main road. That left untouched a regular series of pillars of gypsum which supported the roof. At that stage the roof was the thin stratum of marl. At a later stage the ball rock was brought down by drilling holes in it and firing shots: that left the upper and thicker stratum of marl as the roof.

The marl roof was never supported by timbering or otherwise. It was regularly tapped with a hammer to see whether it was safe. If tapping gave a "dummy" or "drummy" sound that showed that that piece of marl was loose and it was brought down. But when the roof rang true when tapped it was regarded as secure. The holes and faces were each about 20 feet wide, so a junction where a face and a hole met was about 20 feet square or rather larger than that.

The accident occurred at the junction between No. 6 face and No. 9 hole. The thick stratum of gypsum had been removed and the men were engaged in bringing down the ball rock. The ball rock had already been removed from this junction and the roof

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of the junction had been tested by tapping and it seemed to be secure. The man working with the deceased was standing on trestles boring a shot hole in the ball rock at the mouth of No. 9 hole and the deceased was standing below him steadying the trestles. Then, without any warning, a large piece of the roof just behind them fell, and the edge of it struck the deceased and killed him.

The piece which fell was about 30 feet by 15 feet in area and was of a mushroom shape, being about 8 inches thick in the middle. The upper surface of this piece and the lower surface of the marl above were smooth and oily there being no continuity between them. But as they had been tightly pressed together there was some cohesion, and the piece of marl which fell did not become loose or fall as soon as the stratum below it had been withdrawn. That condition was known to mining engineers as "slickenside." The evidence was that it was impossible to detect discontinuity of that kind before the piece actually fell because, owing to there being no gap between it and the other part of the marl above it, the discontinuity was not disclosed by tapping the roof, and there appeared to be no known way of discovering its existence. It seemed that the part below the discontinuity only fell when air began to percolate into it, and the evidence did not show how long the interval might be between the removal of the supporting stratum below and the fall of the slickenside. It appeared that slickenside was not confined to any particular type of stratum. It occurred in comparatively small areas and there was no means of discovering when a slickenside area was being approached. The condition was very rare, and in this mine it had certainly not occurred in the 20 years before the accident, though there was some evidence that it had been found about a mile away some 20 years earlier.

The only way to make a roof secure against a slickenside fall appeared to be to shore it up, and, as the presence of slickenside could not be detected in advance, full protection against that danger would require that every roof under which men had to pass or to work should be shored up or timbered. There was evidence that that was never done in gypsum mines, and that in this mine the cost of doing so would have been so great as to make the carrying on of the mine impossible.

But it came out in evidence that after the accident, while mining was going on in the slickenside area, which was found to stretch some distance beyond the place where the accident

happened, additional precautions were taken. The system used in that area was to insert a hydraulic or pneumatic prop near each working place, unless it was thought that the roof might be thin in any place, and then the ball rock was not worked at all there, but the men passed on and began to bring it down again some distance further on, thus leaving a bridge of ball rock and marl at the place which was thought to be of doubtful safety. It appeared that a prop would give good security if the roof at that point was thick, but that if it were thin the prop was of little value because once the thin roof became loose it would break in pieces and fall all around the prop. The mine manager said in evidence that if slickenside had been suspected at the place where the accident happened the men would have been withdrawn, but it did not appear from the evidence how, during the adoption of those additional precautions, it was determined whether or not the roof was safe enough to go on working with a prop near the working place. Jones J. said, with regard to that evidence of the manager: "His answer was that as it turned out this was a place where "men should not have worked, but that may be being wise after "the event."

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Witnesses for the respondents said that the indiscriminate use of props would give a false sense of security and on that ground they ought not to be used generally. It was common ground that even if there had been a prop near the place of the accident the deceased might still have been killed.

Paget Q.C. and *David Hunter* for the appellant. The question is whether the mine owners have proved that it was not reasonably practicable to make the roof secure. The relevant regulation 7 (3) of the Metalliferous Mines General Regulations, 1938, is to the same effect as section 102 (8) of the Coal Mines Act, 1911. In *Lochgelly Iron and Coal Co. Ltd. v. M'Mullan*¹ Lord Wright examined the nature of actions for breach of statutory duty. The proviso as to practicability does not qualify the standard of duty established by the regulation. The duty is to make the roof secure, not merely against some dangers but against all dangers, including slickenside. It is open to the mine owners to show that they could not make the roof secure, but it is not open to them to show that they should not have made it secure.

¹ [1934] A.C. 1, 23; 49 T.L.R. 566.

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As to the meaning of "reasonably practicable," see *In re Naylor Benzon Mining Co. Ltd.*²; *Black v. Fife Coal Co. Ltd.*³; *Summers v. Salford Corporation*,⁴ and *Adsett v. K. and L. Steel-founders and Engineers Ltd.*⁵ "Practicable" means "possible" "to be accomplished with known means or resources," or capable of being carried out in practice. What is practicable for one man may not be so for another who has different means and resources. "Reasonably practicable" means just "practicable" and does not qualify the duty, so that it is enough to show that it was physically practicable to take certain precautions, and it is irrelevant to consider whether in the circumstances it would have been reasonable.

However, if the expression "reasonably practicable" can be taken to qualify the standard of duty owed by mine owners, then it is reasonably practicable for a mine owner to consider not only the probable and usual risks but also the known possible risks. By reason of the regulations the duty of the mine owner is higher than that of the ordinary property owner in that the mine owner must make the roof secure, not only against such probable risks as in the case of the ordinary householder must be guarded against, but also against such possible risks as are known to geologists and are peculiar to mines. Slickenside is a known geological phenomenon and it may be run into at any time. A cautious mining engineer could meet it in a reasonably economical way. The expression in the Act means that if one cannot mine safely one has not a licence to mine dangerously.

In *Wales v. Thomas*⁶ it was held that the question of expense did not come into the consideration of what was reasonably practicable. This was not challenged until *Edwards v. National Coal Board*.⁷ From that case it appears that "reasonably practicable" implies the question: can it be done?

*Black v. Fife Coal Co. Ltd.*⁸ directly governs the present case, showing that "reasonably practicable" means mechanically feasible. In both cases there was an unusual danger which could not easily be anticipated. The joint effect of that case and of

² [1950] Ch. 567; 66 T.L.R. 418;
[1950] 1 All E.R. 518.

³ [1912] A.C. 149, 168; 28 T.L.R.
150.

⁴ [1943] A.C. 283; 59 T.L.R. 78;
[1943] 1 All E.R. 68.

⁵ [1953] 1 W.L.R. 773, 779; [1953]
2 All E.R. 320.

⁶ (1885) 16 Q.B.D. 340, 347, 349;
2 T.L.R. 53.

⁷ [1949] 1 K.B. 704; 65 T.L.R.
430; [1949] 1 All E.R. 743.

⁸ [1912] A.C. 149, 152, 154, 156,
160, 168, 172, 174, 175, 178-9, 181;
28 T.L.R. 150.

Watkins v. Naval Colliery Co. (1897) *Ld.*⁹ is that the obligation imposed is absolute. H. L. (E.)

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In *Coltness Iron Co. Ltd. v. Sharp*¹⁰ the reasoning of Lord Thankerton and Lord Macmillan should be preferred. In *Edwards v. National Coal Board*¹¹ Singleton L.J. puts the law most strongly in favour of the view submitted for the present appellant.

The obligation here is to make the roof safe. The onus is on the mine owners to show that it was not "reasonably practicable" to do so. In *Edwards v. National Coal Board*¹¹ and other cases the view taken was that that meant: was it something that could be done? To take the precautions that were taken after the accident had revealed the slickenside was something that could be done. The words used are not "reasonable and practicable." They mean what a reasonable judge would regard as practicable. The phrase is directed to the task set and the determination of whether it can be performed. It does not matter whether or not it is reasonable to do so.

David Hunter following. As to the meaning of "reasonably practicable," see *Edwards v. National Coal Board*,¹² per Asquith L.J. The assessment of the situation there prescribed must be made before the accident. Slickenside may be an unlikely danger, but it must be considered. The mine owners must consider the nature of the obligation resting on them in respect of each of the situations mentioned in the regulations, and this they did not do. Thus in a travelling road one would require a more permanent support than in a working place. What is practicable in the one place may not be practicable in the other. The mine owner must consider his obligations in the light of inventions and new safety precautions, with which he must keep pace. He must be constantly assessing the situation in the light of changed circumstances. Here the mine owners did not assess the situation in accordance with what Asquith L.J. said in *Edwards v. National Coal Board*.¹² It is assumed for this purpose that he was right, though on behalf of the appellant the duty would be put higher.

A. P. Marshall Q.C. and *A. E. James* for the respondent company. At the trial the judge found that the mine owners had failed to take the precaution of using pneumatic props at the place of the accident and that had they done so it might have

⁹ [1912] A.C. 693, 702; 28 T.L.R. 569.

¹¹ [1949] 1 K.B. 704.

¹² *Ibid.* 712.

¹⁰ [1938] A.C. 90; 53 T.L.R. 978; [1937] 3 All E.R. 593.

H. L. (E.) prevented the death. The finding went no further than that
1954 and he was not considering whether that precaution would have
discharged the mine owners' statutory obligation.

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Slickenside is abnormal and is limited to small areas. In gypsum mines the normal manner of securing the roofs is by tapping, inspection and bringing down the parts which are known to be faulty. Timbering and propping are not normal processes. In gypsum mining one must face the possibility of slickenside and guard against it in the course of normal management and working.

The questions here are: (1) What is the duty on the mine owners? (2) What steps are required on their part to comply with it? (3) Assuming that they were in breach of their duty, has it been proved that the breach established brought about the death?

Where the words "reasonably practicable" are used the duty imposed is not absolute: see *Black v. Fife Coal Co. Ltd.*¹³ It is subject to a qualification. Accordingly, the duty is not absolute here. It approximates closely to the common law test, if it is not actually the same: see *Caswell v. Powell Duffryn Associated Collieries Ltd.*¹⁴ and *McCarthy v. Coldair Ltd.*¹⁵ Factory legislation recognizes different standards of duty—absolute, practicable and reasonably practicable: see Factories Act, 1937, ss. 14 and 26, and Woodworking Machinery Regulations, 1922, reg. 4.

Under the statute the burden on the mine owners is to make the roof safe so far as is "reasonably practicable." The effect of the words is not to make the employers insurers, as they are under different wording in the Coal Mines Act, 1911. Instead, it places them in the position that they have to take "reasonably practicable" measures for the observance of the requirements. It is not intended that mine owners shall bear all the consequences of the effects of natural forces if no blame attaches to them. The test is to consider a reasonable mine owner making provision against a risk; provided that it was practicable to do so he is in breach if he does not. As to the meaning of "practicable" and "reasonably practicable," see *Lee v. Nursery Furnishings Ltd.*¹⁶ and *Adsett v. K. & L. Steelfounders and Engineers Ltd.*¹⁷

The word "reasonably" imports another consideration in addition to practicability. The standard is less severe than where the thing to be considered is practicability only. The problem

¹³ [1912] A.C. 149, 160, 172-3.

¹⁶ (1945) 172 L.T. 285; 61 T.L.R.

¹⁴ [1940] A.C. 152, 168; 55 T.L.R.

263; [1945] 1 All E.R. 387.

1004; [1939] 3 All E.R. 722.

¹⁷ [1953] 1 W.L.R. 773, 779.

¹⁵ [1951] 2 T.L.R. 1226, 1228.

must be resolved by the test of reason or good sense in all the circumstances. The expression postulates a reasonable mine owner considering the facts on which he is sought to be made liable. It suggests something which a reasonable mine owner can reasonably be asked to carry out in the situation he has to face. He has to ask himself: what are the risks? What are the necessary steps to eliminate them whether in terms of cost, time or trouble? These things must be brought into reasonable balance.

Reliance is placed on *Coitness Iron Co. Ltd. v. Sharp*,¹⁸ *Edwards v. National Coal Board*¹⁹ and *Taylor v. R. & H. Green and Silley Weir Ltd.*²⁰

On the test of what is "reasonably practicable" an ordinary prudent mine owner is not obliged to obviate every risk. When the words "so far as is reasonably practicable" are incorporated in a statutory obligation, and are not put in simply as an escape route, the test whether or not there is a breach is the same as at common law.

In the present case the knowledge of slickenside cannot be restricted to geology. The mine owners must take into account their experience in this particular mine and area. It is from both that the prudent mine owner must assess the possible presence or absence of slickenside to decide whether it is to be reasonably anticipated. It is abnormal and, when found, it is confined to limited areas. There is no evidence that it had been found to be present here within the last 20 years. Even propping or timbering is not a complete protection. It is impossible to give absolute security against it. In this case the risk was not to be entirely neglected, but it was to be rated very low in terms of expense to be incurred in guarding against it.

Black v. Fife Coal Co. Ltd.,²¹ relied on by the appellant, is, if properly considered, very much in favour of the mine owners, since, on the view taken by the House of Lords, before the pit which had produced a gassy seam and had been closed was joined to the pit where men were working, the remote risk of the well-known phenomenon of carbon monoxide gas was not one which called for special precautions to guard against it.

In any event, there was no evidence that the failure to prop here brought about the death, and the judge did not so find.

Since the abolition of the defence of common employment, it may be that the burden of proof has been altered. Further, it is

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Co. Ltd.¹⁸ [1938] A.C. 90.¹⁹ [1949] 1 K.B. 704.²⁰ [1951] 1 Lloyd's Rep. 345, 347, 348.²¹ [1912] A.C. 149.

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not clear that where the wording is such as is used in this Act the full onus of proof is on the mine owners, although it is conceded that they must show that reasonably practicable steps have been taken.

[Reference was made to the Coal Mines Regulation Act, 1872, s. 51; the Metalliferous Mines Regulation Act, 1872, s. 23; the Coal Mines Regulation Act, 1887 (under which *Black v. Fife Coal Co. Ltd.*²¹ was decided) and the Coal Mines Act, 1911, ss. 49 and 102 (8).]

Paget Q.C. in reply. The mine owners here, bearing the burden of proving that the precautions which they should have taken were not reasonably practicable, are far from having done so. That is the appellant's fundamental submission. When a roof falls down it is for the mine owners to show that they have adopted all reasonably practicable means of keeping it up, even though such means might not have provided complete safety. *Coltness Iron Co. Ltd. v. Sharp*²² turns on a different point from the present. *Britannic Merthyr Coal Co. Ltd. v. David*²³ indicates that the onus is on the mine owners. One starts with the position that the man was killed by a fall of roof and that there is an absolute obligation on the mine owners to make it secure. Once that is established the court looks to see what the mine owners can establish by way of defence. They may show that it was not reasonably practicable to make the roof secure. It is not a defence to show that the precautions they could have taken would only have made it 50 per cent. secure if they did not in fact make it 50 per cent. secure. In *McCarthy v. Coldair Ltd.*²⁴ Denning L.J. cited *Callaghan v. Fred Kidd & Sons (Engineers) Ltd.*²⁵ as to the burden of proving what is reasonably practicable. It is conceded that in this case timbering would not have been reasonably practicable.

Their Lordships took time for consideration.

April 1. LORD OAKSEY. My Lords, I have come to the conclusion, after some hesitation and with much sympathy for the appellant, that the judgment of the Court of Appeal is right.

The question to be decided is whether the death of the appellant's husband was caused by the failure of the respondents

²¹ [1912] A.C. 149.

²² [1938] A.C. 90.

²³ [1910] A.C. 74; 26 T.L.R. 164. [1944] 1 All E.R. 525.

²⁴ [1951] 2 T.L.R. 1226, 1228.

²⁵ [1944] K.B. 560; 60 T.L.R. 409;

to take reasonably practicable steps to secure the roof of the gypsum mine in which he was working.

The deceased man was working in the respondents' gypsum mine when the roof fell on him and killed him, and the fall of the roof was due to slickenside.

Slickenside is a rare geological fault which is due to air getting in to the roof and causing a fall. It cannot be detected by any ordinary method of inspection or sounding, and it had never been found in the respondents' mine for 20 years before the accident in question. The ordinary practice is to sound the roof by tapping with a hammer or other utensil and, if it sounds what is called "drummy," to bring it down, but where slickenside occurs the roof does not sound "drummy" and there was no known way of detecting it. In consequence the respondents, following the ordinary practice, had sounded the roof with hammers at the place of the accident, and finding it was not drummy had allowed the deceased and his mate, who was called as a witness, to proceed with their work.

After the accident the respondents found that the slickenside was present from, or more or less from, the point at which the accident had happened for some considerable distance, and in consequence, where they thought that the roof appeared dangerous, they refrained from working underneath it; where they thought it doubtful they propped it up with pneumatic props, and if they found it to be "drummy" they brought it down as before.

In these circumstances the appellant contended, and Jones J. held, that the respondents, in not taking the precautions which they took after the accident, had failed to take reasonably practicable steps to keep the roof secure before the accident, and that this failure was the cause of the deceased's death.

I agree with the Court of Appeal that it was not reasonably practicable to take such steps when slickenside had never occurred in the mine for the last 20 years. The position before the accident and the position after the accident are two quite different things. The question is not simply whether it was practicable as a matter of engineering, but whether it was reasonably practicable when no such thing as slickenside had occurred in the mine for at any rate 20 years or even been heard of by many experienced miners although it is a known geological fault. I agree with the speech of Lord Atkin in *Coltness Iron Co. Ltd. v. Sharp*,¹ where he said: "In the facts of this case where the

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¹ [1938] A.C. 90, 93-4; 53 T.L.R. 978; [1937] 3 All E.R. 593.

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“ dangerous machinery was exposed for only a few minutes as the
“ only means of effecting necessary repairs in a part of the mine
“ where is was unlikely that any workman would be exposed to
“ risk of contact with the machine other than the engineer
“ engaged in the work of repair, I am unable to take the view
“ that it was reasonably practicable by any means to avoid or
“ prevent the breach of section 55. The time of non-protection is
“ so short, and the time, trouble and expense of any other form
“ of protection is so disproportionate that I think the defence is
“ proved.” That is to say, what is “ reasonably practicable ”
depends upon a consideration whether the time, trouble and
expense of the precautions suggested are disproportionate to the
risk involved. It is conceded in the present case that it was not
reasonably practicable to make the roof secure by timbering,
and to have attempted to make it secure by pneumatic props in
some places and by leaving it unmined in others when no
slickenside had ever occurred for a period of 20 years was not, in
my judgment, reasonably practicable.

I agree with what Jenkins L.J. said²: “ To my mind that
“ which is ‘ reasonably practicable ’ in this context is no more
“ nor less than what is capable of being done to make roofs and
“ sides secure within the limits of what it is reasonable to do ; and
“ it cannot be reasonable to do for this purpose anything more
“ than that which it appears necessary and sufficient to do accord-
“ ing to the best assessment of what is necessary and sufficient
“ that can be made at the relevant time, that is, in the present
“ instance a point of time immediately prior to the accident.”

Some argument was addressed to your Lordships’ House as to
the onus of proof, but as all the evidence is before your Lord-
ships and the respondents accepted the position that the onus
was on them to show that reasonably practicable steps had been
taken, I do not think it necessary to decide this question. At
the same time, I must say that, in my opinion, it is clear that the
obligation upon the respondents was not an absolute obligation to
make the roof secure but was a qualified obligation to make it
secure so far as was reasonably practicable. Nor do I find it
necessary to decide whether, if the respondents had been in breach
of their obligation, it would have been right to hold that the
deceased’s death was caused by their breach.

For these reasons I would dismiss the appeal.

² [1953] 1 Q.B. 167, 179; [1952] 2 T.L.R. 941; [1952] 2 All E.R. 1044.

LORD REID. My Lords, the appellant's husband was killed by a fall of the roof at the place where he was working in the respondents' gypsum mine, and this action was brought to recover damages from the respondents. The only ground of liability now maintained is that the death of the deceased was caused by a breach of a statutory duty of the respondents.

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The Metalliferous Mines General Regulations, 1938, made by the Board of Trade under powers contained in the Coal Mines Act, 1911, and the Mining Industry Act, 1920, provide that the regulations set out in that order shall be in substitution for the provisions contained in the general rules in section 23 of the Metalliferous Mines Regulation Act, 1872. Section 23 provides:

"The following general rules shall, so far as may be reasonably practicable, be observed in every mine to which this Act applies . . .," and it is common ground that that part of section 23 continues to apply so as to qualify all the regulations contained in the 1938 order. Regulation 7 (3) in that order provides: "The roof and sides of every travelling road, outlet and working place shall be made secure, and no person, unless engaged in repairing or in investigating the safety of the workings shall travel on or work in any travelling road or working place which is not so made secure"; and reading this with the initial part of section 23 of the Act of 1872 it must mean that so far as may be reasonably practicable the rule shall be observed that the roof and sides of every travelling road, outlet, and working place shall be made secure, etc. The fact that the roof fell shows that it had not been made secure, and the question in this case, therefore, is whether, on the facts proved, the qualification "so far as may be reasonably practicable" applies.

[His Lordship stated the facts and continued:] The only way to make a roof secure against a slickenside fall appears to be to shore it up, and, as the presence of slickenside cannot be detected in advance, full protection against this danger would require that every roof under which men have to pass or to work should be shored up or timbered. There is evidence that this is never done in gypsum mines and that in this mine the cost of doing it would be so great as to make the carrying on of the mine impossible. Ultimately, it was not maintained by counsel for the appellant that timbering was reasonably practicable, and I think that it is proved that it was not reasonably practicable to comply fully with the requirement of regulation 7 (3) so as to make the roof secure against this particular danger.

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[His Lordship referred to the evidence as to precautions to be taken against slickenside and continued:] I think that on a fair reading of the evidence, a skilled man, considering the matter before the accident occurred, would have known that slickenside is always a possibility but would have been entitled to assume, in the light of the 20 years freedom from it, that it was extremely improbable that there would be slickenside at that point, and indeed there was no more risk of slickenside at the point where the accident occurred than there had been at any point in the mine during the preceding 20 years when it had never been found. It follows that if there was any obligation to take further precautions at the point where the accident happened there must have been that obligation to take precautions throughout the mine for the preceding 20 years, and the question is whether such precautions would have been reasonably practicable.

It is not said that the use of props would have cost so much as to make working the mine uneconomic, but obviously using them regularly would have entailed a good deal of extra trouble and loss of time, and witnesses for the respondents said that indiscriminate use of props would give a false sense of security, and on that ground they ought not to be used generally. There would be a false sense of security because, as I have said, the prop is not an effective protection where the roof is thin, and indeed it appears to be common ground in this case that even if there had been a prop near the place of this accident the deceased might still have been killed, because when the slickenside gave way the prop would not have held up the roof, much of the piece which fell would have broken away and the deceased might well have been hit and killed by the fall. Jones J. said, with regard to this: "The view I have formed, although it is not altogether " supported by all the evidence that has been given, is that if " such a prop had been used at the time, although it is by no " means sure that the death of this man would have been pre- " vented, there is quite a possibility that it would have been " prevented through the fall of the roof having been broken in " some way or dissipated so that the amount that fell on the " deceased man would have been smaller than was in fact the " amount that actually fell on him."

I turn to consider what is meant by precautions being " reasonably practicable." It was maintained for the appellant that this means no more than " practicable " and that it is enough to show that it was physically practicable to use the precautions and

irrelevant to consider whether in the circumstances it would have been reasonable to do so. This argument was said to be supported by the decision of this House in *Black v. Fife Coal Co. Ltd.*³ I do not so read that case. It may be that "practicable" and "reasonably practicable" were sometimes used in that case interchangeably. But the circumstances were such that it made no difference which expression was used. The point was whether those in authority should have been instructed about carbon monoxide gas, and if it was practicable to foresee that this gas might have been found in the workings it was certainly reasonably practicable to take precautions against it by instructing those in authority how to test for it and deal with it. But, in my judgment, there may well be precautions which it is "practicable" but not "reasonably practicable" to take, and I think that that follows from the decision of the Court of Appeal in *Edwards v. National Coal Board*.⁴ I agree with what was said in that case by Asquith L.J. (as he then was), and I do not find it helpful to consider whether this statutory duty is in every case the same as an employer's common law duty. I think it enough to say that if a precaution is practicable it must be taken unless in the whole circumstances that would be unreasonable. And as men's lives may be at stake it should not lightly be held that to take a practicable precaution is unreasonable. I have avoided comparison with similar provisions in the Coal Mines Act and elsewhere. Different phraseology has been adopted in different cases, and while the general effect may be the same, I do not think it helpful in borderline cases to argue from one statutory provision to another which is differently expressed.

Slickenside was a known danger, but there was no more reason to anticipate it or provide against it at the place of the accident than elsewhere in the mine, and a finding that precautions ought to have been adopted at the place of the accident would imply that they ought also to have been adopted generally. I am of opinion that this was not reasonably practicable, and I base my opinion on these factors. The danger was a very rare one. The trouble and expense involved in the use of the precautions, while not prohibitive, would have been considerable. The precautions would not have afforded anything like complete protection against the danger, and their adoption would have had the disadvantage of giving a false sense of security. I am therefore of opinion that this appeal should be dismissed.

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³ [1912] A.C. 149; 28 T.L.R. 150.⁴ [1949] 1 K.B. 704; 65 T.L.R. 430; [1949] 1 All E.R. 743.

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LORD TUCKER. My Lords, the Metalliferous Mines General Regulations, 1938, are now substituted for the general rules contained in section 23 of the Metalliferous Mines Regulation Act, 1872. The result is that they are all subject to the prefatory words "the following general rules shall, so far as may be reasonably practicable, be observed in every mine to which this Act applies." The regulation in question in this appeal is No. 7 (3). [His Lordship read the regulation.]

The appellant's husband was a miner working in the respondents' gypsum mine and he was killed by a fall of the roof in a working place in that mine. The roof had not been made secure. The defence was that it was not reasonably practicable to have made it secure. The fall of roof was due to the presence of "slickenside," a rare geological phenomenon but one the existence of which is well known to mining engineers. It is a particularly dangerous condition when it does occur, since there is no known method of discovering its existence before it is revealed by the fall which takes place. It is not detectable by the normal process of hammering, which is the method used for ascertaining the existence of a faulty roof from the "drummy" sound which results in such a case.

It was conceded by counsel for the respondents at the trial—and I think rightly conceded—that on proof of the fall of roof the onus was on him to show that it was not reasonably practicable to have avoided it. I have reached this conclusion from the language of the regulation taken in conjunction with the prefatory words. I do not consider that the fact that "the difficulty or ease of doing what is necessary to maintain safety is so much more within the knowledge of the management than of their workpeople" (to quote the dicta in the judgments of the Court of Appeal in *Callaghan v. Fred Kidd & Son (Engineers) Ltd.*⁵ and in *McCarthy v. Coldair Ltd.*,⁶ delivered respectively by Scott L.J. and Denning L.J.) is in itself a sufficient justification for shifting an onus which normally lies on a plaintiff. Such reasoning would be equally applicable to many cases of common law negligence, e.g., the failure to take all reasonable steps to provide a reasonably safe system of work. Regulation 7 (3) lays down the duty, i.e., to make the roof secure. I agree that the word "secure" does not involve security from the effects of earthquake or an atom bomb, but I think that it must include

⁵ [1944] K.B. 560, 565; 60 T.L.R. 409; [1944] 1 All E.R. 525.

⁶ [1951] W.N. 590, 591; [1951] 2 T.L.R. 1226.

security from all the known geological hazards inherent in mining operations. The prefatory words, however, enable the mine owner to escape liability if he proves that it was not reasonably practicable “to observe” the requirements of regulation 7 (3). I think that the word “observe” shows that the obligation is to be measured by the words of the regulation but that observance of the obligation may be excused in certain circumstances. Furthermore, “observed so far as may be reasonably practicable” indicates, I think, that if 100 per cent. security is not reasonably practicable but a lower percentage is, the mine owner is required to take those reasonably practicable steps which will afford a degree of security which may be something less than 100 per cent.

I do not think that this view of the respondents’ obligations under regulation 7 (3) conflicts with the decision of this House in *Coltness Iron Co. Ltd. v. Sharp*,⁷ where the obligation under section 55 of the Coal Mines Act, 1911, that “every fly-wheel “and all exposed and dangerous parts of the machinery used in “or about the mine shall be kept securely fenced” was under consideration, and it was held that the suggested precautionary measure of excluding access to the machine would not have been a compliance with the statutory duty because, as Lord Macmillan pointed out⁸: “It is one thing to fence off access to a machine “and another thing to fence securely a dangerous part of the “machine.”

Did the respondents, then, succeed in discharging this onus? The trial judge, Jones J., accepted their evidence that timbering was not reasonably practicable on the ground of expense. This finding was upheld in the Court of Appeal, and counsel for the appellant did not seek to disturb it. He based himself entirely on certain evidence given by the respondents as to the precautions which have been taken at this mine since this accident in working the area where slickenside has been found to be present. The method adopted has been to use hydraulic props in the working places where slickenside was known to be present. The difficulty with regard to this is that the evidence disclosed that the use of any sort of prop under a roof which is faulty will tend to push up the faulty roof in the immediate vicinity of the prop causing the surrounding roof to fall. This being the case, the hydraulic prop is only used at places where the roof looks good and there is a fair thickness. If the roof looks good but there is not much thickness, it is left in position and forms a kind of

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⁷ [1938] A.C. 90.

⁸ Ibid. 99.

H. L. (E.) bridge. But if the roof is found by the hammer test to be
1954 "drummy" it is brought down.

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This threefold method has been used in this mine where the slickenside is known to exist, and the respondents' under-manager stated that they had thereby reduced the danger of accident from slickenside, although neither he nor any other witness said there was any method of ascertaining whether slickenside was in fact present at any particular place. On this the judge said: "The view I have formed, although it is not altogether supported by all the evidence that has been given, is that if such a pneumatic" (this should have been hydraulic) "prop had been used at the time, although it is by no means sure that the death of this man would have been prevented, there is quite a possibility that it would have been prevented through the fall of roof having been broken in some way or dissipated so that the amount that fell on the deceased man would have been smaller than was in fact the amount that actually fell on him."

My Lords, I do not consider that this finding is conclusive against the respondents. If the judge, having heard all the evidence and being in a much better position to appreciate its effect than I am from a perusal of what Lord Simon once referred to as the "still life" of the shorthand note, had found that the hydraulic prop method if in use at the time of the accident would have given security or even a high degree of security, I do not think the fact that slickenside had not been found or suspected in this mine for at least 25 years would have sufficed to relieve the respondents from liability. But in weighing the suggested precautionary measures against the risk it is, I think, very material to consider the degree of security which those measures can be expected to afford, and when one finds that the risk of slickenside is very remote and that the suggested measures are of an elaborate nature and would only result in a "possibility" that the accident would have been prevented or its consequences mitigated, I do not consider that a finding against the respondents is justified.

My Lords, for these reasons I have come to the conclusion that the Court of Appeal were right in disturbing the judgment of the trial judge, but there are some passages in the judgments in that court, particularly in the judgments of Jenkins L.J. and Hodson L.J., which seem to me to impose on the respondents a duty no different from that existing at common law, whereas, in my opinion, the result of regulation 7 (3), coupled with the

prefatory words with regard to its observance, is to put the respondents in a position in which their liability cannot be ascertained merely by applying the test of common law negligence.

I would dismiss the appeal.

LORD COHEN. My Lords, I have had the advantage of reading the opinion of my noble and learned friend, Lord Tucker, in which I concur.

LORD KEITH OF AVONHOLM. My Lords, after some difficulty I find myself able to agree with your Lordships that this appeal fails. It is obvious that the roof of the working place at which the deceased man was working was not secure and *prima facie*, therefore, the mine owners were in breach of regulation 7 (3) of the Metalliferous Mines General Regulations, 1938. The regulation, however, is qualified by the provision that it shall be observed "so far as may be reasonably practicable." It is for the mine owners to show that they have so observed the regulation. The position of a mine owner under the corresponding language of the earlier Coal Mines Regulation Acts, which is indistinguishable from the language in the Metalliferous Mines Regulation Act, 1872, has been considered on several occasions in this House. In *Black v. Fife Coal Co. Ltd.*⁹ it is put by Lord Kinnear as follows: "If the rules are broken and mischief follows, there "is *prima facie* evidence of failure of duty, and although the "employer may have a complete defence if he has done his best, "the burden of proving it lies upon him."

It was no doubt a physical or engineering possibility for the mine owners in the present case to have carried out the precautions which were carried out after the accident. These might not have ensured absolute security. But I agree with my noble and learned friend, Lord Tucker, that if absolute security is not reasonably practicable that does not excuse the mine owner from taking those reasonably practicable steps that will give a lesser degree of security. But it is not the precautions in themselves which have to be reasonably practicable. It is the observance of the precautions that is required so far as may be reasonably practicable. That calls, I think, for a consideration of the whole circumstances at the time of the accident, an assessment of the situation, as it has been put, at the material time. The regular means of securing the roof in this mine was by a system of tapping

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⁹ [1912] A.C. 149, 164.

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and bringing down loose portions of roof where insecurity was indicated by the sound given off by the tapping. This had been the only system employed, so far as the evidence reveals, in the history of the mine, and on experience seems to have been found safe and satisfactory. It was carried out at the deceased man's working place just before the accident and revealed no imperfection in the roof. In these circumstances it can, I think, be said that the mine owners have established that it was not reasonably practicable that they should add to their precautions a system of using hydraulic props and leaving bridges in the roof to meet a risk which there was no reason to anticipate.

I would only add that, in my opinion, the question whether a mine owner has discharged a statutory obligation laid upon him must depend on the particular circumstances of each case. There is, in my opinion, no general rule or test that can safely be relied on for measuring the discharge of such a duty. In particular I could not, as at present advised, accept it that the measure of an employer's liability can satisfactorily be determined by having regard solely to the proportion which the risk to be apprehended bears to the sacrifice in money, time or trouble involved in meeting the risk.

Appeal dismissed.

Solicitors: *Amery-Parkes & Co. for Hawley & Rodgers, Loughborough; Smith & Hudson for Eking, Manning, Morris & Foster, Nottingham.*

[HOUSE OF LORDS.]

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APPELLANT;

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AND

Jan. 12.
13, 14, 15.
Feb. 19.

DIRECTOR OF PUBLIC PROSECUTIONS . . . RESPONDENT.

Criminal Law—Evidence—Accomplice—Warning—Necessity for—Rule of law—"Accomplice"—Meaning—Receivers—Evidence of system—Issue of accomplice vel non—Whether determinable by judge or jury—Murder—Fight between groups of youths—Death from stab wound—Participant in fight acquitted of murder and convicted of common assault—Witness against participant charged with murder—Whether warning necessary in charge to jury.
Fact or law.

* *Present*: LORD SIMONDS L.C., LORD PORTER, LORD OAKSEY, LORD TUCKER and LORD ASQUITH OF BISHOPSTONE.

In a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution it is the duty of the judge to warn the jury that, although they may convict on his evidence, it is dangerous to do so unless it is corroborated. This rule, although a rule of practice, now has the force of a rule of law, and where the judge fails to give due warning the conviction will be quashed, even if in fact there be ample corroboration unless the appellate court can apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

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Rex v. Baskerville [1916] 2 K.B. 658 applied.

Persons who, if called as witnesses for the prosecution, are treated as accomplices are persons who were participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact to felonies or persons committing, procuring or aiding and abetting misdemeanors. The term has been extended, so that receivers have been held to be accomplices of the thieves from whom they receive goods on the trial of the latter for larceny. Further, when a person is charged with a specific offence on a particular occasion and evidence has been properly admitted of his having committed crimes of this identical type on other occasions, as proving system and intent and negating accident, then in relation to those other offences, if evidence of them is given by parties to them, the evidence of those parties should not be left to the jury without a warning that it is dangerous to accept it without corroboration. The category of "accomplices" should not be further extended.

If it is in dispute as to whether a witness is an accomplice, and there is evidence on which a reasonable jury could so find, the issue of "accomplice vel non" is for the jury to determine.

The appellant, together with other youths, attacked with their fists another group, one of whom subsequently died from stab wounds inflicted by a knife. Six youths, including the appellant and one L., were charged with murder but finally the appellant alone was convicted, L. having been among four against whom no evidence was offered and who were found not guilty of murder but convicted of common assault. At the appellant's trial L. gave evidence for the prosecution as to an admission by the appellant of the use of a knife by him but the judge did not warn the jury of the danger of accepting his evidence without corroboration:—

Held, that there was no ground for quashing the conviction, since L., not knowing before the murder that any of his companions had a knife, was not an accomplice in the crime of murder.

Decision of the Court of Criminal Appeal (sub nom. *Reg. v. Davies*) [1954] 1 W.L.R. 214 affirmed.

APPEAL from the Court of Criminal Appeal (Lord Goddard C.J., Sellers and Barry JJ.).

This was an appeal by Michael John Davies from the decision of the Court of Criminal Appeal on December 1, 1953, affirming

H. L. (E.) his conviction at the Central Criminal Court on October 22, 1953,
1954 of the murder of John Ernest Beckley on Clapham Common on
July 2, 1953.

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The facts, stated by Lord Simonds L.C., were as follows: The trial of October 22, 1953, was the sequel of an earlier trial at which the jury were divided. At the earlier trial not only Davies but five other youths were indicted for the murder in question. The case was tried before Pearson J. All six pleaded "Not Guilty." Against four of them—Power, Lawson, Woodman and Allen, the Crown offered no evidence on the charge of murder, and the jury returned a formal verdict of "Not Guilty" on that issue. Coleman and the present appellant, Davies, stood their trial for murder. On September 21, 1953, the jury disagreed as to both, and the Crown announced that there was no intention to proceed with the charge of murder against Coleman. On September 22 no evidence was offered against him and the jury found him "Not Guilty" of murder. The five defendants acquitted of murder were then arraigned on a charge of common assault, pleaded guilty and were sentenced to sundry terms of imprisonment. At this first trial Lawson and Woodman, two of the persons against whom no evidence was tendered on the charge of murder, were called as witnesses against Coleman and the appellant, Davies, and the judge warned the jury that their evidence should be treated as that of accomplices.

The second trial, in which the charge was murder and the sole defendant was Davies, came on for hearing before Hilbery J. on October 19, 1953. The trial resulted in the conviction of the defendant.

The evidence given at the trial was summarized as follows: On the evening of July 2, 1953, four youths, Beckley (the victim of the murder), Chandler, Ryan and Carter, were sitting on benches near a bandstand on Clapham Common. Two were on each of two benches facing each other, and each propped his feet on the bench opposite him, so that no one could pass between the benches towards the stand. Coleman came along and prepared to pass between the benches, but their occupants refused to give way and it would seem that one of them used, concerning Coleman, what he took to be an insulting expression. Coleman then went to a group of persons round the bandstand; and the four boys on the benches, fearing reprisals, withdrew towards what had been called "the fountain," some way off. The group whom Coleman joined, and to whom he said something about the affront he had suffered, consisted of a number of people including Davies.

From this group about eight, including Davies, later moved off towards the fountain in pursuit of the four. But before this happened, two persons by the bandstand, a man called Leaver and a Miss Pilkington (neither of whom could by any stretch be called accomplices of Davies), agreed that, Davies, after hearing Coleman's communication, drew out a green-handled knife from his pocket, a small knife with a "push" handle. Leaver further said that he heard Davies say: "I shall be all right with this." A lad called Wood also saw a green-handled knife in Davies's possession just after Coleman had spoken to Davies.

Davies and his companions, including Lawson, then proceeded to the fountain, and a fight developed there between them and the four fugitives. Davies admitted hitting Ryan, and Ryan later discovered a stab wound under his left arm-pit. Lawson was engaged in this fight. At some stage in it two of the fugitives alleged that someone shouted: "Get out the knives." There was no evidence that at this stage Lawson was still there or that he heard this cry. He swore that he did not. Ryan and Carter moved off from the fountain in one direction while Beckley and Chandler fled in a different direction to a motor-omnibus, which they boarded while it was held up by traffic lights. When it reached its next stop they were torn from its tailboard by Davies and his followers. Davies admitted "doubling up" Chandler with a blow on the stomach, in which region, it appeared afterwards, he had been stabbed. Beckley was pursued to a point 113 yards beyond the bus stop. The evidence as to the precise succession of events at this stage was conflicting, but a Miss Frayling, sitting on the front right-hand bench on the top of the bus, testified that she saw Davies (whom she identified with the greatest confidence) "shake" someone, who could only have been Beckley, and who fell to the ground. She then saw Davies cross the road in front of the bus, and as he did so put a green-handled knife into his right-hand inside jacket pocket. In the same pocket later were found bloodstains. Beckley had eight or nine knife wounds, and died shortly after. There was further evidence of threats by Davies later on to two witnesses who said that if necessary they would say who was really responsible for Beckley's death.

Lawson's evidence was, briefly, that some time after the affray, and after he had heard of Beckley's death, he met Davies at a coffee stall in Venn Street, and that Davies said to him that all he tried to do was to "run a knife up and down," and illustrated by a gesture the difference between this and stabbing. He agreed in cross-examination that at the earlier trial he had

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agreed that Davies might have said: "Somebody must have run a "knife . . ." not "I must have run a knife" up and down, but that he thought it was the latter. In statements to the police, oral and written, Lawson had originally denied all participation in the fight. Later, in further written statements to the police and in his evidence at both trials, he admitted being present both at the fountain and the bus stop phases of it, and in the box he admitted that in his earlier statements to the police he had lied.

Hilbery J. in his summing-up did not warn the jury that Lawson's evidence was, or should be treated as, that of an accomplice.

David Weitzman Q.C., R. R. Russell and Peter Weitzman for the appellant. This appeal is based on two grounds: (a) the failure of the trial judge to apply to the testimony of Lawson the rule relating to accomplices, and (b) improper references made both by the prosecution and the trial judge to the position of the other five men, and the wrongful admission of evidence on the question whether they were in possession of knives at the material time.

With regard to the first point, the following propositions of law are to be applied to the facts: (1) On a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict on his evidence, it is dangerous to do so unless it is corroborated. (2) This rule, although a rule of practice, now has the force of a rule of law. (3) Where the judge fails to warn the jury in accordance with this rule, the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice, unless the appellate court can apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907 (if they consider that no substantial miscarriage of justice has actually occurred). (4) It is enough to bring a witness within the ambit of the rule if there is a reasonable suspicion that he may be an accomplice. (5) The question whether a witness is, or there is reasonable suspicion that he may be, an accomplice is a matter of fact which should be left for the determination of the jury, if there is evidence upon which in law they can so find. Therefore, where such evidence exists, the warning must be given. (6) In determining the question, the fact that another jury has acquitted the witness upon the same charge as that brought against the prisoner is not admissible in evidence; if it be

admissible it is not conclusive evidence that he is not an accomplice. (7) For the purposes of the rule the term "accomplice" includes anyone criminally implicated in the transaction out of which the charge arises—a person who assists in the crime, whether or not he is guilty of it. (8) For the purposes of the rule, evidence cannot be corroboration unless it tends to implicate the accused in the crime with which he is charged.

The first three propositions may be taken together. There is little doubt as to proposition (1). The rule was crystallized in *Rex v. Baskerville*.¹ The first mention of it was in *Rex v. Tonge*² (see Hale's Pleas of the Crown, vol. I, p. 303). See also *Rex v. Rudd*³; *Rex v. Attwood and Robbins*⁴; *Reg. v. Jones*⁵; *Rex v. Durham and Crowder*⁶; *Rex v. Sheehan*⁷; *Rex v. Farley*⁸; *Reg. v. Boyes*⁹; *Reg. v. Stubbs*.¹⁰ After the establishment of the Court of Criminal Appeal there are *Rex v. Tate*¹¹; *Rex v. Christie*¹²; *Rex v. Baskerville*¹³; *Rex v. Davies*¹⁴; *Rex v. Lewis*¹⁵; *Rex v. Farid*¹⁶ and *Rex v. Moore*.¹⁷

The rule is a rule of caution for the benefit of the accused. It is against public policy that a conviction should be allowed to stand which has been obtained without its application and, possibly, because of the failure to apply it, unless it is clear that there has been no miscarriage of justice. If an appellate tribunal were to decide whether the weight of the corroborative evidence was enough to sustain the conviction, it would be usurping the function of the jury in a matter which was peculiarly within their province. The appellate tribunal could never know what credibility (if any) a reasonable jury would have attached to the evidence. The position is as expressed in proposition (3). The statement of the rule in *Rex v. Moore*¹⁷ was wrong. The matter was put in the right way in *Rex v. Davies*¹⁸; *Rex v. Lewis*¹⁹ and *Rex v. Farid*.²⁰ If the rule is virtually a rule of law,

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¹ [1916] 2 K.B. 658.² (1662) Kel.J. 17; 6 St.Tr. 226.³ (1775) 1 Leach C.C. 115.⁴ (1788) 1 Leach C.C. 464.⁵ (1809) 2 Camp. 131, 133.⁶ (1787) 1 Leach C.C. 478.⁷ (1826) Jebb C.C. 54, 56.⁸ (1837) 8 C. & P. 106.⁹ (1861) 1 B. & S. 311, 313, 316, 320, 321.¹⁰ (1855) Dears.C.C. 555.¹¹ [1908] 2 K.B. 680.¹² [1914] A.C. 545, 555, 564; 30 T.L.R. 471.¹³ [1916] 2 K.B. 658.¹⁴ (1930) 22 Cr.App.R. 33.¹⁵ (1937) 158 L.T. 454, 455; 26 Cr.App.R. 110; [1937] 4 All E.R. 360.¹⁶ (1945) 173 L.T. 68, 70; 30 Cr. App.R. 168.¹⁷ (1942) 28 Cr.App.R. 111.¹⁸ 22 Cr.App.R. 33.¹⁹ 158 L.T. 454.²⁰ 173 L.T. 68.

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As to the fourth and fifth propositions, the relevant authorities are *Rex v. Jennings* ²¹; *Rex v. Cratchley* ²²; *Rex v. Heathfield* ²³; *Rex v. Dixon* ²⁴; *Rex v. Rudd* ²⁵; *Rex v. Garland* ²⁶; *Reg. v. Abigail and Macnamara* ²⁷; *Rex v. Reeve* ²⁸; *Rex v. McDonald* ²⁹; *Rex v. Kay* ³⁰; *Attorney-General v. Linehan* ³¹ and *Rex v. Barnes*.³² See also *Corpus Juris Secundum*, vol. 22, para. 797.

Rex v. Barnes ³² and *Rex v. Rudd* ³³ were not cases of witnesses called by the Crown and can be distinguished. The rule here in question applies when the witnesses are called by the Crown. The reasons for the rule might well apply in both cases, but as the law has in fact grown up it does not apply to co-defendants. There may be a reason for the distinction in that the prosecution, relying on the witnesses it calls, has the burden of proving its case by those witnesses and, accordingly, if they are suspect, a warning must be given, though it would be better if a warning were given in all cases.

In a criminal case the benefit of the doubt should always be given to the accused. The principle to be applied is that for the protection of the accused it is not necessary to prove beyond reasonable doubt that the witness was an accomplice. It is enough if he is suspected of being an accomplice.

As to the sixth proposition, the Court of Criminal Appeal was clearly wrong in holding ³⁴ that Lawson, having been acquitted, could not be an accomplice in the murder. See *Duchess of Kingston's* case ³⁵ and *Rex v. Smith*.³⁶ It is not right to say that the possibility of a witness being an accomplice is ruled out because a previous jury has on a formal verdict acquitted him. In the case of Lawson the fact that he had been acquitted of murder and that he was not cross-examined to show that he had committed the murder did not establish that he was not an accomplice. There was evidence on which the jury could say that he took so active a part in the transaction that he was an accomplice. From first to last he was present in the fight in which the

²¹ (1912) 7 Cr.App.R. 242.

²² (1913) 9 Cr.App.R. 232, 233-4.

²³ (1923) 17 Cr.App.R. 80.

²⁴ (1925) 19 Cr.App.R. 36.

²⁵ (1948) 64 T.L.R. 240; 32 Cr. App.R. 138.

²⁶ (1941) 29 Cr.App.R. 46.

²⁷ (1893) 14 N.S.W.L.R. 72, 74.

²⁸ (1917) 17 St.R.N.S.W. 81

²⁹ (1945) 3 D.L.R. 769.

³⁰ [1950] O.R. 235, 239.

³¹ [1929] I.R. 19.

³² (1940) 56 T.L.R. 379; 27 Cr. App.R. 154; [1940] 2 All E.R. 229.

³³ 64 T.L.R. 240, 241.

³⁴ [1954] 1 W.L.R. 214, 217.

³⁵ (1776) 20 St.Tr. 355, 538.

³⁶ (1783) 1 Leach C.C. 288, 289.

deceased was killed. After the cry of "Get out the knives" he continued in the fight, and on that he might have been found guilty of murder. He was in the opinion of another jury not guilty of murder, being given the benefit of a reasonable doubt, but the judge should have said that despite this acquittal he might be guilty of murder. See also *Rex v. Turner*³⁷; *Taylor v. Wilson*³⁸; *Attorney-General v. Linehan*.³⁹

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As to the seventh proposition, for the purposes of this rule the term "accomplice" clearly includes anyone who might be a principal in the first or second degree or an accessory before or after the fact. Further, there have been several decisions in which persons who did not fall within any of these classes have been held to be accomplices within the meaning of the rule. Accordingly, the definition must be widened. One cannot say that an accomplice is merely someone who is guilty of the same crime: see *Rex v. Addis*⁴⁰; *Reg. v. Luck*⁴¹; *Rex v. Jennings*⁴²; *Rex v. Dixon*⁴³; *Attorney-General v. Linehan*⁴⁴; *Rex v. Farid*⁴⁵; *Mahadeo v. Rex*⁴⁶; *Bhula v. Rex*⁴⁷ (which is against the appellant). As to the position with regard to receivers of stolen goods, see Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 778.

The term "accomplice" cannot be restricted to principals in the first and second degree and accessories before and after the fact. The term must not be construed narrowly. It is extremely difficult to define an accomplice. It is not necessary that the witness, in order to be an accomplice, should be guilty of the same offence as the prisoner. It is enough that he should be guilty of an offence so intimately connected with that committed by the prisoner that the one could not have been committed without the other. Or one can say that it is enough if he is guilty of an offence which cannot be separated from the offence charged against the prisoner. The judge, in directing the jury, might ask: "Can you consider one offence without necessarily 'considering the other?'" The word "separated" is used in the sense that one must necessarily consider the offence of the accomplice because it is so bound up with that of the accused that it cannot be separated from it. Thus if four boys attack

³⁷ (1832) 1 Mood.C.C. 347.³⁸ (1911) 106 L.T. 44; 38 T.L.R. 97.³⁹ [1929] I.R. 19.⁴⁰ (1834) 6 C. & P. 388.⁴¹ (1862) 3 F. & F. 483, 489.⁴² 7 Cr.App.R. 242.⁴³ 19 Cr.App.R. 36.⁴⁴ [1929] I.R. 19.⁴⁵ 173 L.T. 68.⁴⁶ [1936] 2 All E.R. 813, 817.⁴⁷ [1910] T.P. 70.

H. L. (E.) 1954 another boy they commit a common assault, and if one whips out a knife and stabs him the murder could not have been committed without the act of all the boys.

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The reasons for caution in accepting the evidence of accomplices are: (1) The accomplice being a criminal, his evidence is impugned; (2) he has a strong motive to remove suspicion from himself by fixing it on another; (3) if he has a spite against the accused, then, knowing all the circumstances of the crime, he will have little difficulty in making convincing false charges against him, although the accused is innocent.

As to the eighth proposition, on the assumption that the rule in *Rex v. Tate*⁴⁸ and *Rex v. Moore*⁴⁹ applies, and that the conviction must stand if there was ample corroboration, this proposition applies: see also *Rex v. Baskerville*.⁵⁰ Here there was no corroboration within the proposition.

No warning was given in this case that Lawson was an accomplice, and therefore the conviction should be quashed. The case was opened by the prosecution in two ways: (1) It was said that the appellant was guilty of murder because he had killed Beckley. (2) It was said that even if he was not shown to have stabbed and killed Beckley, he was armed with a knife, engaged in a fight in which Beckley was killed, by one of the others (Lawson being among them), and therefore he was guilty of constructive murder. The whole of the evidence was given on that basis but the point of constructive murder was withdrawn from the jury. Though in the speech of counsel for the accused the word "accomplice" was not used, reference was made to the other lads and to the part they took in the fight. There was evidence that Lawson was participating in a felony in the course of the commission of which Beckley was killed: see *Rex v. Betts*.⁵¹ Thus there was evidence for the jury to consider whether in the strictest sense he was an accomplice, and the judge should have reminded the jury of the part he took in the attack. The main point was to put before the jury the position as it was.

[LORD SIMONDS L.C. At your instance the judge withdrew from the jury the charge of a concerted attempt to commit a felony; now you are complaining that he did not treat Lawson's evidence on the basis that there was a concerted attempt to commit a felony.]

⁴⁸ [1908] 2 K.B. 680.

⁴⁹ 28 Cr.App.R. 111.

⁵⁰ [1916] 2 K.B. 658, 664.

⁵¹ (1930) 144 L.T. 526, 528, 529;

22 Cr.App.R. 148.

There was evidence on which the jury should have been left to consider whether Lawson was an accomplice in the narrowest sense of the term. The Crown having opened the case and called evidence on the basis of a charge of constructive murder and a concerted attempt to commit a felony, it did not lie in the mouth of the prosecution to say that he is not an accomplice. Evidence was given on which it would have been open to the jury to find that Lawson was guilty of murder or on which they might reasonably have suspected that he was guilty of murder. There was evidence that during the fight someone cried "Get out the knives" and Lawson continued in the fight after that. Several knife wounds were inflicted on the lads assaulted, and it was open to the jury to find that they were inflicted by more than one person. Thus Lawson should have been treated as an accomplice and was in such a position that a warning should have been given to the jury.

As to the question of corroboration which if *Rex v. Tate*⁵² and *Rex v. Moore*⁵³ are right must be substantial, if the conviction is to stand, it is hard to say what is "substantial." The House must consider not only whether it is substantial but also whether it should be treated as true. Though the House did not see the witnesses it will direct its mind to any inconsistencies and weaknesses in the corroborative evidence. In this case there are serious inconsistencies and weaknesses. The burden of showing that there was substantial corroboration of Lawson's evidence must be on the Crown. The only evidence connecting the appellant directly with Beckley was Miss Frayling's evidence that he was seen shaking Beckley, which does not imply stabbing. As to the blood on the appellant's clothing, there were at least six assailants and, apart from the deceased, two other lads were stabbed. Apart from what Miss Frayling said all the evidence is consistent with someone else having killed Beckley, while the appellant stabbed the other lads.

Further, the rule, which is a rule of law, is the same whether there is substantial corroboration or not. It would be unsatisfactory if the judge had a discretion in cases where the corroboration is substantial. Whether corroboration is substantial or not is a question of fact. Questions of fact are for the jury and therefore should not be determined by the judge.

Further, the defence was prejudiced by improper references made by both the prosecution and the judge to the position of

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⁵² [1908] 2 K.B. 680.⁵³ 28 Cr.App.R. 111.

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As to the question whether the proviso to section 4 of the Criminal Appeal Act, 1907, should be applied, see *Stirland v. Director of Public Prosecutions*.⁵⁴ The jury obviously attached great importance to Lawson's evidence, and it cannot be said that a reasonable jury, properly directed, would without doubt have convicted. The conviction should not stand.

R. R. Russell following. It is not the law that the warning need not be given where the accomplice giving evidence has ceased to be at risk, for if the necessity then ceased it would follow that once the accomplice was convicted, then if he were called on to give evidence there would be no need for a warning. But that is clearly not so. The more slight the evidence against the witness the greater might be the temptation to divest himself of it. *Attorney-General v. Linehan*⁵⁵ was a case of the evidence of an acquitted person being accepted against the accused; it was held that the warning should have been given. In the case of "approvers," persons who formerly confessed to treasons or felonies and gave evidence against their accomplices, it was usual for them to be either convicted or acquitted before they were called, that their temptation might be the less.

Sir Lionel Heald Q.C., A.-G., Christmas Humphreys and Maxwell Turner for the Crown. It is conceded that the necessity for a warning is a rule of law: *Rex v. Baskerville*.⁵⁶ If that is so, it is desirable to know clearly what an accomplice is.

Here there is substantial agreement between the appellant's counsel and the Crown. The Crown accepts their proposition (1) and also their proposition (2), which follows from *Rex v. Baskerville*.⁵⁶ Proposition (3) is also accepted because it follows from *Rex v. Baskerville*⁵⁶ that the defect is incurable. One can only formulate a logical and satisfactory rule if one leaves the matter to the proviso to section 4 (1) of the Criminal Appeal Act, 1907. The Crown adopts the line which appears to emerge from *Rex v. Farid*⁵⁷ and *Rex v. Lewis*.⁵⁸ Before the Act there was no rule having the force of law. *Rex v. Baskerville*⁵⁹ is the earliest date when it can be said that there was a rule of this kind. There is one line of authorities tending in one

⁵⁴ [1944] A.C. 315; 60 T.L.R. 461; [1944] 2 All E.R. 13.

⁵⁵ [1929] I.R. 19.

⁵⁶ [1916] 2 K.B. 658, 670.

⁵⁷ 173 L.T. 68.

⁵⁸ 158 L.T. 454.

⁵⁹ [1916] 2 K.B. 658.

direction and another in another direction, and the House cannot avoid deciding for one or the other. The Crown cannot urge the acceptance of any line but that of *Rex v. Baskerville*.⁵⁹ Proposition (3) is accepted with the reservation that the restricted definition of accomplice to be indicated later will demonstrate that Lawson's evidence is not to be rejected. Proposition (4) is not accepted. There must be evidence on which a jury could properly find that the witness was an accomplice if the matter were submitted to them. There is no justification for the wider view. Proposition (5) is accepted save in so far as it refers to "reasonable suspicion" that a witness is an accomplice. Proposition (6) is accepted to the extent that the acquittal of the witness is not conclusive evidence that he was not an accomplice, but the fact is admissible in evidence. Proposition (7) is not accepted because of its vagueness and because it is much too wide in any event if the rule is to be of effective application. Proposition (8) is accepted. It is really propositions (4) and (7) that are questioned.

The Crown's propositions are as follows: (1) An accomplice is a person against whom a jury has found or might properly find, on the evidence available, that he was a principal or accessory or that he aided or abetted in the commission by the accused of the crime about which he is giving evidence.

(2) In respect of the evidence of an accomplice so defined called on behalf of the prosecution, the trial judge *must* warn the jury that it is dangerous to convict in the absence of corroboration. Omission to give such a warning constitutes per se a miscarriage of justice, i.e., a wrong decision on a question of law, within the meaning of section 4 (1) of the Criminal Appeal Act, 1907, and the appellate court *must* quash the conviction unless it can apply the proviso.

(3) In respect of the evidence of a witness who is not an accomplice as defined, but whose evidence may reasonably be considered suspect as being for some reason tainted or unreliable, the trial judge is not obliged to give, but it is a matter for his discretion whether or not he shall give, any such warning, having regard to the nature of the witness and his evidence and to the corroboration available. Omission to give a warning in such a case does *not* constitute per se such a miscarriage of justice.

As to the position of a receiver giving evidence against a thief, see *Rex v. Jennings*⁶⁰ and *Rex v. Dixon*.⁶¹ The basis of

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⁵⁹ [1916] 2 K.B. 658.⁶¹ 19 Cr.App.R. 36.⁶⁰ 7 Cr.App.R. 242.

H. L. (E.) the law in this connexion is that owing to its development the offences of receiving and stealing are interlocking offences so closely associated that they are regarded as constituting the same crime for the purposes of this argument. But that is not the same as the case of four boys fighting with their fists and a fifth using a knife.

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As to proposition (1), the following definitions of "accomplice" are relevant: Oxford English Dictionary: "An associate in guilt. A partner in crime." Encyclopaedia Britannica: "One who is associated with another or others in the commission of a crime whether as principal or accessory." Wharton's Law Lexicon: "One concerned with another or others in the commission of a crime" (citing Hawkins' Pleas of the Crown, 87). Bouvier's Dictionary (U.S.A., 1926, p. 32): "All participes criminis, whether they are considered in strict legal propriety as principals in the first or second degree or merely as accessories before or after the fact." (Refers to Foster's Crown Law, 341, and 4 Blackstone's Commentaries, 371.) Also a definition of "approver": "An accomplice in crime who accuses others of the same offence."

As to proposition (2), the defect in not giving the warning can be cured only by the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and the Crown cannot support the view that corroborative evidence alone, however ample, can ever justify the application of the proviso; in this case it is not asked that the proviso should be applied.

As to proposition (3), the judge is not obliged to give a warning in the case of a witness whose evidence is merely tainted with suspicion, but if he were not to do so the question might arise whether or not he had exercised his discretion on the wrong principles.

The three propositions are intended to cover the whole field. The first covers everything which the appellant contends should be covered, save the present case. No extension of it could be formulated without making the definition impossibly wide so that proposition (1) would be assimilated to proposition (3).

As to proposition (1) the definition of "accomplice" may cover the case where the witness has been acquitted. The classic instance of this was the former custom of making one of the criminals a Crown witness against the others after he had been acquitted or pardoned: see *Rex v. Tonge*.⁶² No doubt in such a

⁶² Kel.J. 17, 18.

case a warning would be appropriate since the evidence of the witness would be in the highest degree suspect: see Taylor on Evidence, 12th ed., p. 614, para. 967, n. (e). This is the origin and basis of the present rule. The matter as a whole is treated in an article on The Evidence of Co-prisoners, by R. N. Goodinson, Cambridge Law Journal, vol. II, pp. 209, 227, 228. See also *Rex v. Grant*⁶³ and *Rex v. Barnes*.⁶⁴ The conclusion reached by the Crown is not inconsistent with the law laid down in *Rex v. Baskerville*.⁶⁵ That is the law which should be applied, but that case leaves open the question: who is an accomplice?

As to proposition (2), there are divergent currents of authority relating to the rule as to the warning to be given on the evidence of accomplices. *Rex v. Tate*⁶⁶ and *Rex v. Moore*⁶⁷ are against the suggestion that there is an inflexible rule that the warning must be given. *Rex v. Davies*⁶⁸ and *Rex v. Lewis*,⁶⁹ in accordance with *Rex v. Baskerville*,⁷⁰ suggest that if no warning has been given that amounts to a misdirection and the matter can only be remedied by the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907. *Rex v. Rudd*⁷¹ is neutral: that case should perhaps be left out of account because it was a case of the evidence of a co-defendant. It may be that when a co-defendant gives evidence exculpating himself, the rule is obligatory in the case of evidence given for the prosecution but not in the case of evidence given for the defence. Say there are three prisoners. C pleads guilty. A calls him to prove that he was not on the scene of the crime, necessarily involving the inference that B was there. In such a case one gets into an area of great difficulty.

*Rex v. Farid*⁷² is a case in favour of the contention of the appellant: see *Rex v. Baskerville*.⁷³ The Irish case of *Attorney-General v. Linehan*⁷⁴ was one of the factors which helped to compel the Crown to make the admissions which it did on this point. In such a case in England the court would have held that the omission to give the warning could only be remedied by recourse to the proviso.

In Scottish law the expression *socius criminis*, meaning an

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⁶³ (1944) 30 Cr.App.R. 99, 105.

⁶⁴ 56 T.L.R. 379, 381.

⁶⁵ [1916] 2 K.B. 658.

⁶⁶ [1908] 2 K.B. 680.

⁶⁷ 28 Cr.App.R. 111.

⁶⁸ 22 Cr.App.R. 33.

⁶⁹ 158 L.T. 454.

⁷⁰ [1916] 2 K.B. 658.

⁷¹ 64 T.L.R. 240.

⁷² 173 L.T. 68.

⁷³ [1916] 2 K.B. 658.

⁷⁴ [1929] I.R. 19.

H. L. (E.) accomplice, has been interpreted strictly: see *Dow v. Mac-Knight*⁷⁵ and *Wallace v. Lord Advocate*.⁷⁶

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Applying the Crown's propositions to this case, Lawson was not an accomplice because he was not guilty of, or an accessory to, the murder, and therefore the judge was under no obligation to give a warning to the jury. So far as that part of the case is concerned, the appeal must fail.

As to proposition (3) and the discretion of the judge to warn the jury in the case of a witness who is not an accomplice but whose evidence is tainted, the judge here did not exercise his discretion on a wrong principle and he was fully entitled to act as he did. So far as this proposition is concerned there is no ground for saying that there was any miscarriage of justice and therefore the question of the application of the proviso does not arise.

The Crown supports the conclusion of the Court of Criminal Appeal, but not for its reasons, for it cannot be that the acquittal of the witness is enough to settle whether or not he was an accomplice. The appeal should be dismissed.

Christmas Humphreys following. There is nothing more to be added on the law, but it is desirable to put Lawson's evidence into its true perspective. It is not the fact that the Crown's case consisted of Lawson's evidence with a certain amount of corroboration. The case for the Crown was that Leaver, Wood and Miss Pilkington saw a knife in the hand of Davies before the fight began, and Leaver heard him say: "I shall be all right with this." He was present when Ryan was stabbed at the fountain and when Chandler was stabbed at the bus stop. He was one of the group who pulled the two lads off the bus and he was close to and fighting with the lads who were stabbed. Miss Frayling's evidence was put high to the jury both by counsel and the judge. She was self-possessed and clear, and she never had any doubt that she saw Davies come from the obviously injured Beckley. She saw him close a knife and put it in his inside right-hand pocket, and blood was afterwards found inside that pocket. The case against Davies could have rested there. Only afterwards does Lawson come into the picture.

Counsel for the Crown at the trial never had it in mind that Lawson was an accomplice and, in any event, the corroboration was extremely strong. As to his being an accomplice in murder, it was suggested that many wounds were inflicted and that they

⁷⁵ 1949 S.C.(J.) 38.

⁷⁶ 1952 S.C.(J.) 78.

could not all have been given by the same knife, but there is no evidence that they were not. H. L. (E.)

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Lawson was acquitted of murder on no evidence being given against him, because the judge was satisfied that on the depositions there was literally no evidence, and, in the absence of later evidence to the contrary, such an acquittal is conclusive. Here there was no later evidence, and counsel for the defence never put it to Lawson in cross-examination that he had used a knife.

He was never an accomplice at all, and the judge was entitled to use his discretion as to the warning to be given to the jury. Lawson was constantly referred to as having come from prison, and to that extent the jury were warned that he was a witness about whose evidence special care should be taken. No one asked the judge to treat him as an accomplice.

David Weitzman Q.C. in reply. The submission of the Attorney-General creates two categories—accomplices and near-accomplices—but for this there is no warrant in the authorities. His dictionary definitions of “accomplices” can have no weight because the term is a term of art, the meaning of which must be found in the authorities. The definition submitted for the appellant covers all existing cases.

In considering the position of a witness there may be two stages: (1) The judge must consider whether he is obliged to give a warning. (2) The jury then have to decide whether or not the warning takes effect. It is enough if the jury have a reasonable suspicion that the witness was an accomplice; they need not be convinced beyond reasonable doubt. The accused should have the benefit of any doubt.

It is not necessary that the witness should be guilty of the same offence as the prisoner. Proposition (7) of those already submitted should state that it is enough to show he is guilty of an offence so intimately connected with the offence of which he is giving evidence that one of the two could not have been committed without the other. But, even accepting the Crown’s definition of an accomplice, Lawson fell within it.

Jan. 15.’ LORD SIMONDS L.C. My Lords, the House has heard a full and careful argument from both sides, and I understand that your Lordships agree with me in entertaining no doubt that this appeal should be dismissed. As, however, some questions of general principle have been raised on which the House may deem it proper to pronounce, I propose to move now from the Woolsack the dismissal of the appeal while the House takes

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The House then voted that the appeal should be dismissed.

Feb. 19. LORD SIMONDS L.C. My Lords, this is an appeal from a judgment of the Court of Criminal Appeal, pursuant to the fiat of the Attorney-General, who certified that the case raised a point of law "of exceptional public importance." The appellant had, on October 22, 1953, been convicted of the murder on Clapham Common of a youth called Beckley. He appealed to the Court of Criminal Appeal and his appeal was dismissed by that court on December 1, 1953, the court's reasons for its judgment being delivered by Sellers J. three days later. On December 10 the Attorney-General gave his certificate. The appeal was heard before your Lordships on January 12-15, 1954, the House, at the close of argument, intimating their decision to dismiss the appeal, but deferring till later their statement of their reasons for doing so.

Before coming to the facts I should refer to the course of certain earlier proceedings. [His Lordship did so, and continued:] The main ground of this appeal is that Lawson was again called as a witness, but that Hilbery J. in his summing up did not give the jury the warning which, it was said, was appropriate and necessary in relation to the evidence of a witness who was, or might well be, an accomplice: that there was an inflexible rule of law calling for such a warning: and that, as it was not complied with, the conviction must be quashed. (There was a second and subsidiary ground with which I will deal briefly hereafter.)

Before dealing with the main contention I will summarize shortly the evidence given at this trial. [His Lordship summarized the evidence and continued:] It is manifest that this evidence would, on a proper direction to the jury, have been abundantly sufficient to support a verdict of guilty, there being ample evidence that Davies possessed and produced a knife and none that anyone else possessed one.

But it is said that there was not a proper direction, inasmuch as Lawson was called and gave certain evidence; and Lawson was an "accomplice" of Davies; and the judge gave no warning that Lawson's evidence should be treated with corresponding caution. It is not disputed that the judge gave no such warning.

The judge, in his summing-up, dealt with Lawson's evidence on pages 176-7 of the petition and record on the appeal and, as indicated, did not warn the jury that that evidence was, or should be treated as, the evidence of an accomplice. It is argued for the appellant that this was misdirection—or, to use the exact language of section 4 (1) of the Criminal Appeal Act, 1907, a "wrong decision on a point of law." It was not, nor could it, in my view, be argued for the Crown that if this contention were right, the conviction could nevertheless be upheld under the proviso to that subsection on the ground that "no substantial miscarriage of justice" had occurred: viz., on the ground that if there had been no such misdirection a reasonable jury must equally have convicted. The evidence, if admissible, was not unimportant, and the jury emerged from their retirement to ask the judge some questions about it.

My Lords, I will recur later to certain other features of the trial which appear indirectly relevant, but for the present will proceed to deal with three problems raised by the main ground of appeal, namely—(A) What is the scope and effect of the rule that a judge ought to warn juries in connexion with the evidence of an "accomplice"? (B) What is an "accomplice" within the rule? (C) Whatever be the true answers to these questions, what (if any) is their application to the evidence of Lawson?

(A)—I do not propose to explore the remote historical origins of the rule, nor the old doctrine and practice of "approvement." It is clear that an accomplice is and was at all material times a competent witness, and that a conviction based on his evidence, though uncorroborated, could, and can today be supported: and a judge may properly direct a jury that they are entitled if they choose to act on such uncorroborated evidence. But for over a century and a half it has been customary for judges to warn juries that it is dangerous to convict on such evidence, free though they are, if they find it wholly convincing, to do so. For most of that period it has been laid down that such a warning was not a precondition of a valid conviction, but was within the judge's discretion to give or to withhold: *Rex v. Durham and Crowder*¹; *Rex v. Atwood and Robbins*,² in which 12 judges, to whom the question was referred, stressed the discretionary nature of any directions given by the judge; Lord Ellenborough's observations in *Rex v. Jones*³; *Rex v. Sheehan*⁴; *Rex v. Farley*,⁵ where the warning

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¹ (1787) 1 Leach. C.C. 478.² (1788) 1 Leach C.C. 464.³ (1809) 2 Camp. 131.⁴ (1826) Jebb C.C. 54, 56.⁵ (1837) 8 C. & P. 106, 107.

H. L. (E.) is referred to as "a practice which deserves all the reverence
1954 " of law "; *Reg. v. Boyes*.⁶

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My Lords, these authorities treat the rule as prescribing at most a salutary and usual practice, to be followed or not, at the judge's discretion: and the whole current of the decisions until the 20th century is in this sense. But after the enactment of the Criminal Appeal Act in 1907, what was no more than a "practice" manifests an increasing tendency to assume the hard lineaments of a rule of law: and as such, many of the decisions of the Court of Criminal Appeal, especially since *Rex v. Baskerville*,⁷ treat it. But in other decisions of the same court the older, the "discretionary" view still finds expression. A great many authorities were cited to your Lordships. It will be sufficient for the purpose of illustrating the dualism to which I have called attention, to cite relatively few. If I may summarize their effect in advance, I would say that the "discretionary" school of thought is illustrated by such authorities as *Rex v. Tate*⁸ and *Rex v. Moore*,⁹ and the "peremptory" school of thought (if for brevity I may so call it) by decisions such as *Rex v. Davies*¹⁰; *Rex v. Lewis*,¹¹ and *Rex v. Farid*¹²; and subject to certain qualifications which I will indicate when dealing with it, the case of *Rex v. Baskerville*¹³ itself.

*Rex v. Tate*¹⁴ was the earliest of this series being, indeed, decided shortly after the Court of Criminal Appeal was established. In that case the court quashed the conviction for want of a warning to the jury as to the need for corroboration of the evidence of an accomplice: but added that if there has been *in fact* enough corroboration, this would have excused the want of a warning and justified the maintenance of the conviction. It has been suggested that this last observation was obiter, and the same suggestion may be made in regard to some of the decisions the other way.

In *Rex v. Moore*,¹⁵ however, the observation was not regarded as obiter, and again the existence of sufficient corroboration in fact was regarded as an adequate substitute for compliance with the rule.

In 1916—between these cases—*Baskerville's* case¹⁶ was

⁶ (1861) 1 B. & S. 311.

⁷ [1916] 2 K.B. 658.

⁸ [1908] 2 K.B. 680.

⁹ (1942) 28 Cr.App.R. 111.

¹⁰ (1930) 22 Cr.App.R. 33.

¹¹ (1937) 158 L.T. 454; 26 Cr.App.
R. 110; [1937] 4 All E.R. 360.

¹² (1945) 173 L.T. 68; 30 Cr.App.
R. 168.

¹³ [1916] 2 K.B. 658.

¹⁴ [1908] 2 K.B. 680.

¹⁵ 28 Cr.App.R. 111.

¹⁶ [1916] 2 K.B. 658.

decided. The point directly in issue in that case was not what consequences flowed from the omission to give a warning. A warning, and a more than sufficient one, had *ex concessis* been given: and the only question directly for decision was whether there existed evidence which could amount to the corroboration for which the warning called. The court held that it did. The judgment, however, went much outside the immediate issue raised, in an attempt to quiet doubts and settle the law.

In this sphere of general principle the following passages from the judgment of a court which commands high respect (Lord Reading C.J., Scrutton, Avory, Rowlatt and Atkin JJ.) delivered by Lord Reading C.J., are relevant¹⁷:—"There is no doubt that "the uncorroborated evidence of an accomplice is admissible in "law (see *Rex v. Atwood*¹⁸). But it has long been a rule of "practice at common law for the judge to warn the jury of the "danger of convicting a prisoner on the uncorroborated testimony "of an accomplice or accomplices, and, in the discretion of the "judge, to advise them not to convict upon such evidence; but "the judge should point out to the jury that it is within their legal "province to convict upon such unconfirmed evidence (*Reg. v. Stubbs*¹⁹; *In re Meunier*²⁰). This rule of practice has become "virtually equivalent to a rule of law, and since the Criminal "Appeal Act came into operation this court has held that, in the "absence of such a warning by the judge, the conviction must be "quashed." For this last proposition *Rex v. Tate*²¹ is cited but does not support it, for in *Rex v. Tate*,²¹ as has been observed above, the court would not have quashed the conviction, even in the absence of a warning, if there had been sufficient corroboration in fact. I continue to quote from *Baskerville's* case²²:—"In *Rex v. Everest*²³ the court said: 'The rule has long been "established that the judge should tell the jury to acquit the "prisoner if the only evidence against him is that of an accom- "plice, unless that evidence is corroborated in some particular "which goes to implicate the accused.' We think 'tell the jury "to acquit' should read 'warn the jury of the danger of "convicting.'" Finally, Lord Reading said²⁴: "If the judge "failed to give the warning, this court would be bound to set aside "the conviction." These words, though they carry weight,

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¹⁷ [1916] 2 K.B. 658, 663.¹⁸ 1 Leach C.C. 464.¹⁹ (1855) Dears. 555.²⁰ [1894] 2 Q.B. 415.²¹ [1908] 2 K.B. 680.²² [1916] 2 K.B. 658, 668.²³ (1909) 2 Cr.App.R. 130, 132.²⁴ [1916] 2 K.B. 658, 670.

H. L. (E.) 1954 having regard to their source, were unnecessary to the decision, as indeed were certain other parts of the judgment.

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Baskerville's case,²⁵ however, when every allowance has been made for the possibility that part of it is obiter, undoubtedly supports the proposition that the rule is "peremptory" and a breach of it incurable. There is no reference in *Baskerville's* case²⁵ itself to the proviso to section 4 (1).

The view which it propounded was adopted in *Rex v. Lewis*²⁶ subject to the possible operation of the proviso to section 4 (1) of the Criminal Appeal Act. In that case the Court of Criminal Appeal decided that, if the warning be omitted, the conviction can only stand if there exists corroborative evidence of such a convincing, cogent and irresistible character that "the jury," if they had received the proper warning, must have come to the same conclusion. The court found itself unable to say, in that case, that "the jury" must inevitably have come to the same conclusion, and consequently quashed the conviction.

The case, decided a few years earlier, of *Rex v. Davies*²⁷ qualifies the principle later applied in *Rex v. Lewis*²⁸ to this extent, that even though the summing-up omitted any express warning as to accomplice evidence, the conviction could be supported in a case in which "from first to last, the case was "conducted on the footing that the issue was whether the "evidence of the bankrupt and his wife was confirmed by other "evidence," and counsel for the appellant at the appeal admitted that counsel who appeared for the appellant at the trial did refer to the evidence of these witnesses as that of accomplices. This being so, the Court of Criminal Appeal was of opinion that "the "jury" would inevitably have arrived at the same conclusion if an express warning had been given by the judge.

If these two decisions are right in substance yet each is subject, in my judgment, to this corrigendum, namely, that for "the jury" should be read "a reasonable jury." No appellate court can tell what a particular jury would have decided in circumstances which did not occur.

Two other cases were cited to us—*Rex v. Rudd*²⁹ and *Rex v. Garland*³⁰: but these cases concern the proper procedure as to warning and the like where one co-defendant gives evidence

²⁵ [1916] 2 K.B. 658.

²⁶ 158 L.T. 454; 26 Cr.App.R. 110.

²⁷ 22 Cr.App.R. 33, 35.

²⁸ 158 L.T. 454; 26 Cr.App.R. 110.

²⁹ (1948) 64 T.L.R. 240; 32 Cr. App.R. 545.

³⁰ (1941) 29 Cr.App.R. 46.

implicating another—a case with which your Lordships are not troubled here. H. L. (E.)

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The only decision of your Lordships' House in which the rule as to accomplices' evidence is touched on is *Rex v. Christie*,³¹ where Lord Atkinson's observations, inclining to the "dictionary" view, were plainly unnecessary to the decision, the evidence in dispute not being that of any accomplice, and the law as to accomplices' evidence only introduced as an analogy.

My Lords, having indicated the rival versions of the rule as to warning propounded in *Tate's*³² and *Moore's* case³³ on the one hand, and the cases of *Baskerville*,³⁴ *Davies*³⁵ and *Lewis*³⁶ on the other, I have formed the opinion that whichever might be preferred if the matter were res integra, as things are the latter cases, laying down the stricter rule, have the preponderant weight of authority on their side, and should be adopted by your Lordships on this appeal. The true rule has been, in my view, accurately formulated by the appellant's counsel in his first three propositions, more particularly in the third. These propositions as amended read as follows:—

"First proposition:

"In a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated.

"Second proposition:

"This rule, although a rule of practice, now has the force of a rule of law.

"Third proposition:

"Where the judge fails to warn the jury in accordance with this rule, the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice, unless the appellate court can apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907."

The rule, it will be observed, applies only to witnesses for the prosecution.

The remaining questions, therefore, on the main issue are—(B) and (C)—What is an "accomplice" within the rule? And

³¹ [1914] A.C. 545; sub nom. *Director of Public Prosecutions v. Christie*, 30 T.L.R. 471.

³² [1908] 2 K.B. 680.

³³ 28 Cr.App.R. 111.

³⁴ [1916] 2 K.B. 658.

³⁵ 22 Cr.App.R. 33.

³⁶ 158 L.T. 454; 26 Cr.App.R. 110.

H. L. (E.) has the rule, on the proper construction of the word "accomplice" contained in it, any application to Lawson in the present case?

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There is in the authorities no formal definition of the term "accomplice": and your Lordships are forced to deduce a meaning for the word from the cases in which X, Y and Z have been held to be, or held liable to be treated as, accomplices. On the cases it would appear that the following persons, if called as witnesses for the prosecution, have been treated as falling within the category:—

(1) On any view, persons who are *participes criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanors). This is surely the natural and primary meaning of the term "accomplice." But in two cases, persons falling strictly outside the ambit of this category have, in particular decisions, been held to be accomplices for the purpose of the rule: viz.:

(2) Receivers have been held to be accomplices of the thieves from whom they receive goods on a trial of the latter for larceny (*Rex v. Jennings* ³⁷; *Rex v. Dixon* ³⁸):

(3) When X has been charged with a specific offence on a particular occasion, and evidence is admissible, and has been admitted, of his having committed crimes of this identical type on other occasions, as proving system and intent and negating accident; in such cases the court has held that in relation to such other similar offences, if evidence of them were given by parties to them, the evidence of such other parties should not be left to the jury without a warning that it is dangerous to accept it without corroboration. (*Rex v. Farid* ³⁹).

In both of these cases (2) and (3) a person not a party or not necessarily a party to the substantive crime charged was treated as an accomplice for the purpose of the requirement of warning. (I say "not necessarily" to cover the case of receivers. A receiver may on the facts of a particular case have procured the theft, or aided and abetted it, or may have helped to shield the thief from justice. But he can be a receiver without doing any of these things.) The primary meaning of the term "accomplice," then, has been extended to embrace these two anomalous cases. In each case there are special circumstances

³⁷ (1912) 7 Cr.App.R. 242.

³⁹ (1945) 30 Cr.App.R. 168.

³⁸ (1925) 19 Cr.App.R. 36.

to justify or at least excuse the extension. A receiver is not only committing a crime intimately allied in character with that of theft: he could not commit the crime of receiving at all without the crime of theft having preceded it. The two crimes are in a relationship of "one-sided dependence." In the case of "system," the requirement of warning within the special field of similar crimes committed is a logical application within that collateral field of the general principle, though it involves a warning as to the evidence of persons not accomplices to the substantive crime charged.

My Lords, these extensions of the term are imbedded in our case law and it would be inconvenient for any authority other than the legislature to disturb them. Neither of them affects this case. Lawson was not a receiver, nor was there any question of "system"; Lawson, if he was to be an accomplice at all had to be an accomplice to the crime of murder. I can see no reason for any further extension of the term "accomplice." In particular, I can see no reason why, if half a dozen boys fight another crowd, and one of them produces a knife and stabs one of the opponents to death, all the rest of his group should be treated as accomplices in the use of a knife and the infliction of mortal injury by that means, unless there is evidence that the rest intended or concerted or at least contemplated an attack with a knife by one of their number, as opposed to a common assault. If all that was designed or envisaged was in fact a common assault, and there was no evidence that Lawson, a party to that common assault, knew that any of his companions had a knife, then Lawson was not an accomplice in the crime consisting in its felonious use. It should be borne in mind in this connexion that all suggestion of a concerted *felonious* onslaught had, by consent at the instance of counsel for the defence himself, been expunged from the Crown's case and from the issues put to the jury. Your Lordships would, I feel, be slow to permit counsel for the defence, having got that suggestion buried, to disinter it for the purpose of suggesting that Lawson was constructively an accomplice to the crime of murder and for that reason attracted the rule as to warning.

My Lords, I have tried to define the term "accomplice." The branch of the definition relevant to this case is that which covers "participes criminis" in respect of the actual crime charged, "whether as principals or accessories before or after 'the fact.'" But, it may reasonably be asked, who is to decide, or how is it to be decided, whether a particular witness was a

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H. L. (E.) "particeps criminis" in the case in hand? In many or most cases this question answers itself, or, to be more exact, is answered by the witness in question himself, by confessing to participation, by pleading guilty to it, or by being convicted of it. But it is indisputable that there are witnesses outside these straightforward categories, in respect of whom the answer has to be sought elsewhere. The witnesses concerned may never have confessed, or may never have been arraigned or put on trial, in respect of the crime involved. Such cases fall into two classes. In the first, the judge can properly rule that there is no evidence that the witness was, what I will, for short, call a participant. The present case, in my view, happens to fall within this class, and can be decided on that narrow ground. But there are other cases within this field in which there is evidence on which a reasonable jury could find that a witness was a "participant." In such a case the issue of "accomplice vel non" is for the jury's decision: and a judge should direct them that if they consider on the evidence that the witness was an accomplice, it is dangerous for them to act on his evidence unless corroborated: though it is competent for them to do so if, after that warning, they still think fit to do so. The delimitation which I have outlined as proper, between the provinces of judge and jury in this particular matter, seems to me to be supported both by English authority and by Dominion decisions (e.g., *Rex v. Dixon*,⁴⁰ *Reg. v. Abigail and Macnamara*⁴¹; *Rex v. Reeve and Others*⁴²; *Rex v. McGonald*⁴³; and cf. *Corpus Juris Secundum*, vol. 22, para. 797).

This disposes of the main ground of the appeal.

There was a second ground, very shortly and faintly argued, which can be dismissed in a few words. It was said that it was improper for the evidence of Superintendent Davies to be admitted, to the effect that in a very large number of statements (I think 200) made to him there was no allegation that anyone but the appellant possessed a knife. It is a sufficient answer to this that it was counsel for the appellant himself who cross-examined Superintendent Davies about the sufficiency and result of these inquiries. He was anxious to discover whether any of these statements contained any allegation of the possession by other members of the Davies group of a knife or knives; his interrogation was directed to this purpose; and he cannot

⁴⁰ (1925) 19 Cr.App.R. 36.

⁴¹ (1893) 14 N.S.W.L.R. 72.

⁴² (1917) 17 St.R.N.S.W. 81.

⁴³ [1945] 3 D.L.R. 769.

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complain if the Superintendent returned negative replies. The fact that the questions were put made the replies admissible if they were not otherwise so. Moreover, no objection was taken at the time to his answers.

My Lords, I think you will agree that this appeal has been most ably argued on both sides. There was certainly no contention open to counsel for the appellant to which he did not do full justice. Nevertheless, for the reasons I have now given, your Lordships were constrained to dismiss the appeal.

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LORD PORTER. My Lords, I concur in the opinion that has just been expressed.

LORD OAKSEY. My Lords, I concur.

LORD TUCKER. My Lords, I concur.

LORD ASQUITH OF BISHOPSTONE. My Lords, I also concur.

Appeal dismissed.

Solicitors: *Thomas V. Edwards & Co.; Director of Public Prosecutions.*

[HOUSE OF LORDS.]

NATIONAL COAL BOARD APPELLANTS; H. L. (E.)*

AND

ENGLAND RESPONDENT. Jan. 18, 19,

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20, 21;

Feb. 25.

Mines and Minerals—Coal—Regulations—Shot-firing—Mineworker injured by explosive—Breach of statutory duty by shot-firer and injured worker—Common law duty not superseded—Causation—Mineowner's common law liability for shot-firer's negligence—General Regulations, 1913 (made under Coal Mines Act, 1911, s. 86) (S.R. & O. 1913, No. 748), reg. 1—Explosives in Coal Mines Order, 1934 (made under Coal Mines Act, 1911, s. 61) (S.R. & O. 1934, No. 6), art. 2 (e) (h).

Statutory duty—Contributory negligence. Statutory duty—Whether common law duty superseded. Causation. Vicarious liability—Statutory duty—Departure from scope of employment—Carrying

* Present: LORD PORTER, LORD OAKSEY, LORD REID, LORD TUCKER and LORD ASQUITH OF BISHOPSTONE.

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out employment in wrong way. Ex turpi causa non oritur actio
—Tort—Breach of statutory duty. Contributory negligence—
Causation.

A mineworker, injured by the premature explosion of a detonator, sued the mineowners for damages for breach of statutory duty by their servant, a shot-firer, who had admittedly committed a breach of the Explosives in Coal Mines Order, 1934, art. 2, by firing without having first ascertained that all persons in the vicinity had taken proper shelter; but the injured mineworker had also committed a breach of the regulations in that, by agreement with the shot-firer, he had undertaken to couple up the cable to the detonator, a duty imposed by the regulations on the shot-firer. He was actually in the act of coupling up when the explosion occurred. The trial judge dismissed the action but, having assessed the damages at £2,400, said that he would have awarded the injured mineworker only half that amount on the ground of his contributory negligence. The Court of Appeal, reversing his decision, held that the legal cause of the injury was the shot-firer's act and that there was no ground for reducing the damages. On appeal to the House of Lords:—

Held, (1) that the shot-firer's statutory duty did not supersede his common law duty and he was liable for his failure to perform that common law duty, thereby rendering his employers vicariously liable.

Matuszczyk v. National Coal Board 1953 S.C. 8 approved.

(2) That the injured mineworker was guilty of contributory negligence.

(3) That he was not solely responsible for his own injury in departing altogether from the scope of his employment but was carrying out his employment in the wrong way.

Smith v. Fife Coal Co. Ltd. [1914] A.C. 723; 30 T.L.R. 502 distinguished.

(4) That his breach of statutory obligations imposed to ensure safe working did not debar him from suing as bringing him within the principle "*ex turpi causa non oritur actio*."

Held, further, (*per* Lord Porter, Lord Oaksey and Lord Reid, Lord Tucker and Lord Asquith of Bishopstone dissenting) that the judge's apportionment of the damages should be varied and the total amount assessed should be reduced by one quarter instead of one half.

Decision of the Court of Appeal (sub nom. *England v. National Coal Board*) [1953] 1 Q.B. 724; [1953] 1 All E.R. 1194 varied.

APPEAL from the Court of Appeal (Somervell, Birkett and Romer L.JJ.).

This was an appeal by the appellants, the National Coal Board, who were the defendants in the action, from an order of the Court of Appeal dated April 27, 1953, whereby it was ordered that the appeal of the respondent, Henry George England, the plaintiff in the action, be allowed and that the judgment of

Croom-Johnson J., dated July 26, 1952, be set aside and that judgment be entered for the respondent for £2,400 with costs.

The case arose out of an injury sustained by the respondent on January 25, 1950, when employed underground as a collier in the appellants' Bwllfa Colliery, Aberdare. He assisted a shotsman (one Edward Williams) to prepare to fire a shot in that colliery, first by doing the preliminary stemming with him, ramming a hole with explosive charge, and then by connecting the charge to the firing apparatus by means of a cable which was 25 feet long. Before doing so the respondent said to the shotsman: "I will couple up, Ted," and he replied: "O.K., Harry." The respondent then began to couple up the four loose ends of the cable to the detonator wires while the shotsman went back toward the firing apparatus uncoiling the cable as he went. The respondent assumed that the shotsman would warn the men whom he passed when laying the cable but that after connecting the cable he (the respondent) was to warn the men on the other side of the stent: apparently he did not expect the shotsman to return after he had laid the cable. The respondent took some little time to make the connexion. When he had connected one cable end to one of the detonator wires and was in the act of connecting the other end of the cable to the other end wire of the detonator, the charge was exploded by the shotsman with the result that the respondent suffered severe injuries.

The following statement regarding the cause of the proceedings is taken from the opinion of Lord Porter: The respondent issued a writ against the appellants claiming damages for negligence and breaches of statutory duty under the Coal Mines Act, 1911, and the regulations thereunder. In his pleadings the respondent alleged that the appellants, their servants or agents were in breach of regulation 2 (e) and (h) of the Explosives in Coal Mines Order, 1934, and that Edward Williams, the shotsman, was negligent in firing the shot without ensuring that no one was in the vicinity or that those near had taken shelter, in not giving warning to the respondent, in inviting or permitting the respondent to connect the cable to the detonator and in failing to allow time for the respondent to reach a position of safety before firing the shot. Regulation 2 (e) and (h) were in the following terms: "(e) The person firing the shot shall, before doing so, see that all persons in the vicinity have taken proper shelter, and he shall also take suitable steps to prevent any person approaching the shot . . . (h) Where shots are fired electrically they shall only be fired by a person authorized in writing by the manager for the purpose. The

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“ authorized person . . . shall himself couple up the cable to the
“ fuse or detonator wires and shall do so before coupling the cable
“ to the firing apparatus. He shall take care to prevent the cable
“ coming into contact with any power or lighting cables. He
“ shall also couple the cable to the firing apparatus. Before doing
“ so, he shall see that all persons in the vicinity have taken proper
“ shelter.” As a further ground of claim it was alleged that the
respondent, in accordance with the prevailing practice, of which
the appellants knew or ought to have known, coupled the cable
to the detonator wires, and that the appellants took no steps to
prevent that practice.

The appellants, while denying that the accident was caused
by any negligence or breach of statutory duty by them or their
servants or agents, admitted that the shotsman did not himself
couple up the cable to the detonator wires as required by the
1934 Order, and also that the respondent (being then a person in
the vicinity of the shot) had not taken shelter at the material
time. They alleged, however, that the respondent's injuries were
caused or contributed to by his own negligence or breach of
statutory duty; that he had by his conduct voluntarily accepted
and impliedly consented to run the risk of injury resulting there-
from; and that his injuries had been sustained in consequence of
his own illegal act in coupling up the detonator wires to the
cable, or by his acting pursuant to an illegal agreement between
him and the shotsman to contravene the 1934 Order. The
appellants further relied upon the provisions of sections 75 and
102 (8) of the Coal Mines Act, 1911. Those sections provided—

“ 75. Any person who contravenes or does not comply with
“ any of the provisions of this part of this Act shall be guilty of
“ an offence against this Act, and, in the event of any contraven-
“ tion of or non-compliance with any of the provisions of this
“ part of this Act by any person whomsoever, the owner, agent,
“ and manager of the mine shall each be guilty of an offence
“ against this Act, unless he proves that he had taken all reason-
“ able means by publishing and to the best of his power enforcing
“ those provisions to prevent that contravention or non-
“ compliance.”

“ 102 (8). The owner of a mine shall not be liable to an action
“ for damages as for breach of statutory duty in respect of any
“ contravention of or non-compliance with any of the provisions
“ of this Act if it is shown that it was not reasonably practicable
“ to avoid or prevent the breach.”

As the respondent was ill and unable to attend the trial of his case, his proof of evidence was by consent read as the evidence he would have given, subject to the stipulation that none of the statements contained in it was to be taken as admitted. The shotsman Williams was not called.

A number of witnesses on behalf of the respondent deposed to a practice in that colliery of colliers helping the shotsmen and firemen by coupling up the cable to the detonator. They admitted, however, that they knew that they were doing wrong and that they had never carried out that practice in the presence of the manager or under-manager. The appellants did not challenge the evidence that a number of shotsmen and firemen had over a substantial period of time acquiesced and participated in carrying on that practice.

It was common ground, however, that both the shotsman Williams and the respondent had contravened the 1934 Order by their conduct on the day of the accident.

The case was tried by Croom-Johnson J., who found that the accident happened as described above; that a number of colliers employed in the colliery at varying times disobeyed the 1934 Order, that they knew that by their disobedience they were doing that which they ought not to have done and that their acts were forbidden by that Order; that the respondent in coupling up the ends was contravening it, and knew that his action contravened it and was forbidden; that the shotsman, Williams, also contravened the Order; that the attention of any manager of the mine had never been called to the practice of the colliers to couple up the leads and that there was no evidence that anybody in "any position of responsibility" so far as the appellants were concerned knew of the practice; that all persons in authority under the appellants had taken all reasonable means to prevent the contravention of the 1934 Order and that the appellants had sufficiently published it.

With regard to the claim for negligence, the judge held that, inasmuch as in his view the appellants did not know that colliers were coupling up the leads, it could not be alleged that they or their servants failed to take any proper steps to prevent a practice of which they were ignorant. With regard to the claim for breach of statutory duty, the judge declared that he would adopt what he considered to be the effect of the obiter dicta of the House of Lords in *Harrison v. National Coal Board*.¹ He

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¹ [1951] A.C. 639; [1951] 1 T.L.R. 1079; [1951] 1 All E.R. 1102.

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said that as all due care had been taken by the appellants to prevent a breach of the 1934 Order, and that as no personal liability was imposed directly on the appellants by that Order, they were not responsible for the acts or omissions of the shotsman Williams, or of the respondent, and accordingly the action against them failed. In case, however, he should be held to be wrong in his decision he assessed the damages in respect of the injury at £2,400; but said that, had the appellants' liability been established, he would have awarded only half that amount on the ground of the respondent's contributory negligence in doing what he knew to be wrong and his acquiescence in the shot-firer's breach of the 1934 Order. He gave judgment for the appellants with costs.

The respondent appealed from that decision and the Court of Appeal unanimously allowed the appeal. To the question discussed, but not decided in *Harrison v. National Coal Board*,¹ viz.—whether, the doctrine of common employment being abolished, a plaintiff who failed to prove negligence but established a breach of statutory duty imposed, not on the owner, but upon a workman, could succeed against the owner on the basis of vicarious liability for the statutory breach—the Court of Appeal gave no answer as they did not find it necessary to decide the point. They held that Williams' action, in the absence of any explanation, inevitably established negligence at common law, and they negatived the proposition that, the shotsman's duties being precisely defined by the 1934 Order, it was not open to the respondent to rely upon the negligence of the shotsman as establishing liability against the appellants. In their view the Order did not deprive a workman of his common law rights. Further, they held that the accident was not caused by the respondent's breach of the Order but by the later, independent negligence of Williams, and that therefore the respondent's wrongful act afforded no defence. Accordingly, they held that there was no ground for reducing the damages. Moreover, they were of opinion that, whatever the cause of the accident, the respondent was not negligent.

As regarded the submission for the respondent that the shotsmen and firemen were responsible officials of the National Coal Board and acquiesced in the practice of the colliers' coupling the cable to the detonator, and therefore the respondent could rely upon a de facto dangerous system of work, the Lords Justices

¹ [1951] A.C. 639.

said that, in view of their judgment on the ground of Williams' negligence, it was unnecessary to arrive at or express any conclusion on that point.

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Gerald Gardiner Q.C. and *Meurig Evans* for the appellants. A mine-owner who has observed, to the best of his ability, the provisions of the Explosives in Coal Mines Order, 1934, is not liable for the shot-firer's breach of those provisions of the Order which specifically impose duties on him personally. In *Harrison v. National Coal Board*¹ this question was left open. The solution to it is that the mine-owner is not vicariously liable for the acts or omissions of the shot-firer in the performance of his duties under the Order, whether those acts be negligent or breaches of a statutory provision. Further, in any event, in the performance of those duties otherwise than in accordance with the provisions of the Order the shot-firer was acting outside the scope of his employment. In *Harrison v. National Coal Board*² this argument was put by Lord Reid. In *Alford v. National Coal Board*³ the point did not arise. It was wrongly decided against the appellants' argument in *Nicol v. National Coal Board*⁴ and *Matuszczyk v. National Coal Board*.⁵ The shot-firer's common law obligation was superseded by the regulations.

The legal liability for the actions of others depends on control. In this respect a contract of service differs from a contract for services. One cannot, for example, control a taxi-driver. On the other hand, a servant may step out of his employment so that his employer can no longer control him. Control is the test: *Hillyer v. St. Bartholomew's Hospital Governors*⁶ and *Gold v. Essex County Council*.⁷ The question is: whose orders is the servant obeying at the relevant time? The respondent by coupling up the detonator, a thing which he was forbidden to do, stepped right outside the scope of his employment, and he was therefore solely responsible for his own injury. The mere fact that an employer has a right of dismissal for his employee's unlawful act does not show that it was done in the course of his employment. He may have been on a frolic of his own. Here on the evidence the respondent's conduct in relation to the shot-firing amounted to negligence and the appellants were not liable for his breach of duty.

¹ [1951] A.C. 639.⁵ 1953 S.C. 8.² [1951] A.C. 639, 687.⁶ [1909] 2 K.B. 820; 25 T.L.R.³ [1952] 1 T.L.R. 687; [1952] 1 762.

All E.R. 754.

⁷ [1942] 2 K.B. 293; 58 T.L.R.⁴ (1952) 102 L.J.News. 357.

357; [1942] 2 All E.R. 237.

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*Smith v. Fife Coal Co. Ltd.*⁸ is distinguishable because there the man's act of alleged negligence had been completed before he got back into the course of his employment. That was not so in the present case, which falls within *Kerr v. William Baird & Co. Ltd.*⁹; *McAulay v. James Dunlop & Co. Ltd.*¹⁰ and *Pollock v. Mount Vernon Colliery Co. Ltd.*¹¹ See also *Riddell v. Reid*¹²; *Davies v. Swan Motor Co. (Swansea) Ltd.*¹³; *Nance v. British Columbia Electric Railway Co. Ltd.*¹⁴; *Jones v. Llover Quarries Ltd.*¹⁵; *Cork v. Kirby Maclean Ltd.*¹⁶ and *Stapley v. Gypsum Mines Ltd.*¹⁷ Here there were two breaches of statutory duty, (1) that the respondent coupled up with the shot-firer's concurrence, and (2) that the shot was fired without the precaution of seeing that everyone had taken shelter. The gravity of the first is precisely that the second may follow from it, because if the shot-firer connects up the miner has no occasion to be exposed.

Even if the appellants were liable for the shot-firer's failure to comply with the regulations or for his negligence, the respondent is precluded from recovering because he himself was at all material times acting outside the scope of his employment and he himself was a party to the shot-firer's illegal actions. Here two persons were guilty of breaches of statutory duty and were acting in pursuance of an agreement to break the law. In consequence of the agreement injury to one of them resulted. Accordingly, he is precluded from recovering damages on the principle *ex turpi causa non oritur actio*. The doctrine applicable here is that where a person is complaining of something which occurred when he was committing a criminal offence and which would not have occurred but for the commission of it he cannot recover damages against the employer of a man similarly engaged with him in committing that offence: see *Johnson v. Croggan & Co. Ltd.*¹⁸; *Holman v. Johnson*¹⁹; *Gordon v. Chief Commissioner of Metropolitan Police*.²⁰

⁸ [1914] A.C. 723, 725, 732; 30 T.L.R. 502.

⁹ 1911 S.C. 701.

¹⁰ [1926] A.C. 377, 389-90; 42 T.L.R. 397.

¹¹ [1931] A.C. 597; 47 T.L.R. 485.

¹² [1943] A.C. 1, 31; 58 T.L.R. 335; [1942] 2 All E.R. 161.

¹³ [1949] 2 K.B. 291; 65 T.L.R. 278; [1949] 1 All E.R. 620.

¹⁴ [1951] A.C. 601, 611-2; [1951] 2 T.L.R. 137; [1951] 2 All E.R. 448.

¹⁵ [1952] 2 K.B. 608; [1952] 1 T.L.R. 1377.

¹⁶ [1952] 2 T.L.R. 217; [1952] 2 All E.R. 402.

¹⁷ [1953] A.C. 663, 677-8; [1953] 2 All E.R. 478.

¹⁸ [1954] 1 W.L.R. 195; [1954] 1 All E.R. 121.

¹⁹ (1775) 1 Cowp. 341, 343.

²⁰ [1910] 2 K.B. 1080; 26 T.L.R. 645.

If one is to apply the maxim, having regard to the object of the regulations to protect the men from themselves, it is a significant consideration that these men agreed to break the regulations. Both are obviously to blame, since it cannot be that there was no negligence when there was a deliberate breach of the regulations. It cannot be in the interests of employees that in these circumstances the employers should be made to pay.

Alternatively, the respondent's injuries were "the result" "partly of his own fault" within the meaning of the Law Reform (Contributory Negligence) Act, 1945. The judge's apportionment of the damages should not be disturbed.

Meurig Evans following. As to the damages awarded under section 1 (1) of the Law Reform (Contributory Negligence) Act, 1945, an appellate court will not interfere with the judge's discretion unless it is shown that he has acted on some wrong principle: see *Stapley v. Gypsum Mines Ltd.*²¹

It was the respondent who induced the breach of the regulations by volunteering to do the shot-firer's job. He chose to put himself in the position where he was injured and where he knew that he should not be. His sin was one of commission, not omission, a positive act in going outside his job to do someone else's. It was he who put himself in a position of danger which was the cause of the accident. His responsibility was greater than the shot-firer's.

H. Edmund Davies Q.C. and *Alun Davies* for the respondent. The appellants are responsible for the admitted negligence of the shotsman, their servant. He was guilty both of breach of statutory duty and of common law negligence. The respondent was not negligent. The appellants failed to provide a safe working system.

As to the principle *ex turpi causa non oritur actio*, admittedly if a plaintiff's cause of action is based solely on his own illegal act he cannot recover: see *Cakebread v. Hopping Brothers (Whetstone) Ltd.*²² But the principle does not cover breach of a statutory obligation: see Law Reform (Contributory Negligence) Act, 1945, ss. 1 (1) and 4. Further, public policy is the basis of the doctrine, and it would be contrary to public policy that the respondent should be debarred from the relief. *Smith v. Baveystock*²³ is not this case. See also *Barcock v. Brighton Corporation*.²⁴ The fact that the respondent may have been in

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²¹ [1953] A.C. 663, 682.²³ [1945] 1 All E.R. 531, 533-4.²² [1947] K.B. 641, 644, 646-7; 63 T.L.R. 277; [1947] 1 All E.R. 389.²⁴ [1949] 1 K.B. 339, 341; 65 T.L.R. 90; [1949] 1 All E.R. 251.

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breach of a statutory duty does not bar him from recovering in an action based on the failure of the appellants in breach of their common law duty to provide a safe system of work. It is alleged against the respondent that he agreed to couple up the end of the cable to the detonator, but the cause of action arose out of the premature firing of the battery by the shotsman, and that had no relation to the agreement between the men. Accordingly, the action did not arise out of anything done by the respondent, who was not guilty of contributory negligence.

The liability of the appellants rests on three grounds: (1) vicarious responsibility for the shotsman's admitted breaches of regulation 2 (e) and (h) of the Explosives in Coal Mines Order, 1934; (2) vicarious responsibility for his admitted negligence at common law; and (3) personal negligence in failing to enforce a safe system of working.

As to the third ground, *Wilsons and Clyde Coal Co. Ltd. v. English*²⁵ bears on the appellants' submission that their inability to control the miners enabled them to escape liability. In view of the frequency with which the practice indulged in was carried on, it cannot be described as a casual departure on an isolated occasion from an otherwise impeccable system of work. There was knowledge of it by persons to whom the board had delegated the duty of seeing that there was a safe system of work. The duty to provide a safe system of work is a duty to use reasonable care. If the officials appointed to enforce the regulations are parties to the breach that must make the appellants liable, though it would be otherwise if the miners carelessly concealed their breaches of the regulations from their superiors.

As to the respondent's alleged contributory negligence, it is for the appellants to satisfy the House (a) that his action amounted to a cause of the accident in the legal sense, and (b) that it amounted to negligence. They have not done this. It must be remembered that the physical conditions were cramped. The circumstances entitled the respondent to assume that the shot-firer would not fire the battery until he had satisfied himself that he was out of danger. As to the question of the prevailing practice in the mine, see *Barcock v. Brighton Corporation*.²⁶ The respondent followed the system of shot-firing in operation when he went to the mine, and therefore he was not negligent. He was associating himself with the conduct of the shot-firer,

²⁵ [1938] A.C. 57, 73, 75; 53 T.L.R. 944; [1937] 3 All E.R. 628. ²⁶ [1949] 1 K.B. 339, 343.

who was an important official, and whose action in firing the shot was the cause of the accident. The action of the respondent was not its cause in the legal sense. One must distinguish between the *causa causans* and the *causa sine qua non*: see *Stapley v. Gypsum Mines Ltd.*²⁷ What the workman did physically played a part in the explosion, but it need not have done so and was not a legally causative matter at all. Its causative potency was far less than that of the shotsman's act. The courts in practice have regard to the respective roles of the parties. A less experienced man is never held liable in the same degree as an experienced man and this consideration should play a part in the apportionment of the blame.

Alun Davies following. The Explosives in Coal Mines Order, 1934, was designed primarily to regulate the shot-firer's conduct: see in particular regulation 6 as to the appointment of competent persons as shot-firers. The blameworthiness of the shot-firer was far greater than that of the respondent. As to the duty to comply with directions and regulations, see section 74 of the Coal Mines Act, 1911.

Gerald Gardiner Q.C. in reply. As to the responsibilities for the actions of the shot-firer, see sections 2 (1) and 122 of the Act of 1911 and regulation 1 of the General Regulations, 1911. He was not under the appellants' control and they are not responsible for his breaches of the regulations, which he was bound to follow. In this case it was never suggested that the manager or under-manager knew of the illegal practice with regard to firing. The appellants' system was one of doing what the regulations said should be done. It is not admitted that there was such a practice in the mine, though some men acted in that way. In any case, since the appellants were not told, they cannot be held responsible for a practice by the men which was in existence when they took over the mine and of which they were ignorant.

The regulations are designed to protect not only the man himself who is to obey them but also his fellow employees. If an employee knows that he is under a statutory duty, but is told by his fellows not to bother about it, that may minimize his responsibility, but it cannot be a complete answer to a charge of negligence. As to the fulfilment of statutory obligations, see *Riddell v. Reid*.²⁸ The respondent, admitting breaches of the statutory obligations imposed on him for his own safety, cannot deny that he was also guilty of negligence at common law. No

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²⁷ [1953] A.C. 663, 681.²⁸ [1943] A.C. 1, 31.

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The danger provided against in the regulations of 1934 is that unless one man performs the whole operation there is a possibility of misunderstanding resulting in premature firing. The neglect of this possibility was the real cause of the injury. Nothing in the evidence is inconsistent with an agreement having been made between the men that the respondent would shout when he was safe and with the shotsman having mistaken a shout by someone else for the shout of the respondent. It was the act of the respondent which caused the explosion. If there is an error by which the handle of the battery is already down, the man who connects the cable to the detonator is the man who fires the shot. The action of the shot-firer in not seeing that everyone had taken shelter was a cause of the accident, but the accident was in the legal sense the result of what both men did in firing the shot otherwise than in the way laid down by the regulations. Both men were acting contrary to the regulations. If up to the time of the explosion one of them had repented and gone back to the regulations, there would have been no accident. The real question is whether on the evidence it should be found, on any view of the case, that the injuries sustained by the respondent were sustained partly through his own breach of duty. They were so sustained.

As to the maxim *ex turpi causa non oritur actio*, the provisions of section 1 (1) of the Law Reform (Contributory Negligence) Act, 1945, read with the definition of "fault" in section 4, do not provide an answer where the breach of a statutory duty is also an offence, because such a breach would not give rise to a defence of contributory negligence. If there is an action which the courts would not have entertained before the Act on the grounds of the principle, they will not entertain it now. The courts will not entertain a case where the plaintiff has been guilty of a breach of statutory duty involving a criminal offence. The Act is only dealing with breaches of statutory duty involving a liability in tort, and not involving a crime. It cannot be said that where two men are engaged in a conspiracy to commit a criminal breach of a statutory duty they can turn on their employer and make him pay for the consequences which they suffer.

Their Lordships took time for consideration.

Feb. 25. LORD PORTER stated the facts and the cause of the proceedings (as stated above) and continued: My Lords, in these circumstances the respondent sought to support his claim on three grounds, viz.: (1) that the appellants were liable for the shot-firer's breach of his statutory duty; (2) that, whether they were so liable or not, the shot-firer was guilty of common law negligence and, on the principle of "respondeat superior," the appellants must answer for his wrongdoing; and (3) that the appellants had failed to provide a safe working system. Further, it was contended on his behalf that no contributory negligence on his part had been established and that, even if it had, such negligence was not the cause of his injury.

Undoubtedly Williams, the shot-firer, was in breach of his statutory duty in more respects than one, but it has been urged to your Lordships that those duties are imposed on the shot-firer himself, who must be appointed by the manager and, it is said, is not under the control of his owners in these respects. Therefore, it is maintained on behalf of the employers, they are not vicariously liable, on the ground that Williams acted contrary to the regulations which he was bound to follow.

My Lords, having regard to the opinion which I hold upon the second argument, it is not, I believe, necessary for your Lordships to determine this question, which, as I have said, has indeed been argued already in your Lordships' House in the case of *Harrison v. National Coal Board*¹ and there left undetermined inasmuch as its solution was unnecessary. In the present case, in my view, a solution is again unnecessary, and as the problem is one of some complexity it should remain undetermined until it is directly in issue.

As a variant of this argument the appellants contended that, inasmuch as the regulations prescribe the duty which the shot-firer has to carry out, his common law obligation of exercising due care is superseded, he is liable only for breach of statutory duty, and the appellants are not liable for his failure to perform it. This question must be decided by your Lordships since if that were the shot-firer's only duty, the appellants would be absolved from any liability at common law or, indeed, from any obligation, provided they were not liable for the shot-firer's breach of the statutory regulations.

This matter, also, was argued in *Harrison's* case,¹ but no decision upon it was called for in the circumstances of that case

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and it was left undetermined. So far as I am aware, there is no decision on the matter under English law, but it has twice been decided in Scotland, once by Lord Guthrie in *Nicol v. National Coal Board*,² a case reported only in the Law Journal Newspaper, but of which we have been furnished with a transcript, and again in *Matuszczyk v. National Coal Board*.³ In each case the contention was rejected and, in my opinion, rightly. I may quote a passage from Lord Guthrie's opinion which expresses the view which I hold and states the reason on which it is founded. His words are as follows: "In my opinion the argument is unsound. "The fireman in doing his work as a shot-firer was acting in "the course of his employment by the defenders. In the performance of his work he was required by the regulations to "adopt certain precautions which Parliament has prescribed for "the safety of those employed in coal mines. But it is not "correct to say that he was not acting for his master. The "firing of the shots was the work which he was employed by "the defenders to do. His failure to take the precautions which "Parliament has required of him did not take him outwith the "scope of his employment. Accordingly, his acts were still "within the area in which the vicarious responsibility of a master "operates."

In these circumstances the shot-firer was guilty of common law negligence in the course of his employment unless it can be shown either that he had no reason to apprehend danger from his action or the accident which followed was not the result of his negligence. Two courts have already held him guilty of negligence and I find it difficult to see any flaw in their decision. He was not called to explain or excuse his action, and, quite apart from the regulations, I should myself have found that any reasonable man ought to have foreseen the danger. Nor do I think that the existence of the regulations can be neglected. In the ordinary course of affairs their provisions and object must have been known to all mine workers, and, if known, must have made it abundantly clear not only that an accident might happen, but that its consequences would be to injure a fellow workman. Similar considerations apply to the respondent, who, in my view, was also guilty of common law negligence, and, accordingly, I do not stay to deal with the allegations of breach of statutory duty on the part of the latter.

Two matters remain for consideration: (1) What, in a legal

² (1952) 102 L.J.News. 357.

³ 1953 S.C. 8.

sense, was the cause of the accident? and (2) if it was the result of the negligence of both men, should your Lordships alter the proportion attributed by the judge to each?

The Court of Appeal, basing their decision upon a dictum of Lord Dunedin in *Smith v. Fife Coal Co. Ltd.*,⁴ held that the legal cause was the act of Williams, who fired the shot. The circumstances of that case were in many respects similar to those in that now under consideration; but the question at issue was not concerned with a master's vicarious liability at common law for the negligent act of a shot-firer, but whether a miner who had coupled up the detonator to the charge was acting within the scope of his authority. Your Lordships' House held that he was, but it appears from the observations of Lord Parmoor,⁵ and the later observations of Lord Hailsham in *Pollock v. Mount Vernon Colliery Co. Ltd.*⁶ that the ground of the decision was that the workman had finished coupling the wires and was no longer engaged in a forbidden task, whereas if he had been, as was the miner implicated in the last-mentioned case, still in the act of coupling the wires to the detonator, he would have been outside the scope of his authority.

The judgment in the case now before your Lordships was delivered by Somervell L.J., who quoted Lord Dunedin's words, which were: "I think I can best make my view clear by "taking the case of *Kerr v. William Baird & Co. Ltd.*,⁷ and "contrasting it with this. In that case the miner arranged a "shot and fired it entirely by himself—I mean without the "presence or help of the shot-firer at any stage of the proceeding. "It was held rightly that the accident was due to the action of "the man, and that such action consisted in taking upon himself "duties which he had no right to perform. Here, on the "contrary, the miner did not arrange and fire the shot. One "part of the composite action was his duty—to insert and stem "the detonator—and that he did. The next step—the connecting "of the detonator wire to the cable—he had no business to do, "and in doing it he did something which was not in the sphere "of his employment. But two more stages are necessary before "we arrive at the explosion which causes the injury and forms "the accident, namely, the connecting of the cable to the battery "and the putting the battery into efficient action by the turning "of the handle, and both these stages are done by the shot-firer.

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⁴ [1914] A.C. 723, 729; 30 T.L.R. 502.

⁵ [1914] A.C. 723, 732.

⁶ [1931] A.C. 597; 47 T.L.R. 485.

⁷ [1914] A.C. 723, 729.

⁸ 1911 S.C. 701.

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“ In the circumstances I cannot bring myself to see that the efficient cause of the accident was connected with the arrogation of unauthorized duty by the miner. It is true that no explosion could have taken place unless the cable had been connected with the detonator. But that is only a remote causa sine qua non, and one in which the relation of the appellant to the act as distinguished from any other person is immaterial.” In so expressing himself he was dealing with the question at issue in holding that the miner had finished his unauthorized act and returned to the sphere of his employment. In such circumstances the act of coupling the wires to the detonator in his view was not so closely connected with the subsequent accident that this unauthorized act was not the efficient cause of the accident. I would add that the question whether Lord Dunedin’s dictum should be applied generally to a class of case which he was not considering does not call for determination by your Lordships in the present instance, and I reserve my opinion upon it until it directly arises.

The appellants, however, relying upon the fact that the explosion took place before the miner had completed his self-imposed task, maintained that a miner caught in the act of coupling up the detonator was altogether outside the scope of his employment and, therefore, solely responsible for his own injury. They sought support for their view from a number of workmen’s compensation cases and, in particular, from *Pollock v. Mount Vernon Colliery Co. Ltd.*⁹ In that case, however, the matter under discussion was whether the accident arose out of and in the course of his employment and was not directed to a consideration of common law negligence. Where no question of compensation is under consideration a different approach is, I think, justified, and it should be held that in the present case the respondent in acting as he did was rather engaged in carrying out his employment as mine worker in a wrong way than altogether departing from it.

Before coming to the conclusion whether the proportion of blame attributed to each party should be disturbed, there is one further matter which your Lordships have to determine, i.e., were Williams and England alike engaged in a crime so that the maxim *ex turpi causa non oritur actio* applies and the latter cannot recover? My Lords, save in one case I cannot find that such a plea has ever been put forward in circumstances

⁹ [1931] A.C. 597.

similar to these as excusing common law negligence. It if were sound it would be a defence to many actions in which it was not raised and might also be a defence to many claims for compensation. Conceivably it may be a defence in certain cases between the parties participes criminis, but the argument that it may be a defence between the two persons involved does not support a conclusion that a third party whose servant is one of two involved in disobeying a regulation and so participating in a criminal offence is thereby excused from liability. The present is one of the latter cases, and, though it may be that on some future occasion it will be necessary to find an answer to the conundrum in a case of the former category, so far as the present case is concerned I am prepared to adopt the answer given by Lord Cohen, then Cohen L.J., in *Cakebread v. Hopping Brothers (Whetstone) Ltd.*,¹⁰ where he said: "I feel some doubt "whether this workman could be said to be aiding and abetting "the employers' breach of duty; but, even assuming in favour "of the employers that they established the requisite facts, I "still think that this argument is ill founded. The maxim ex "turpi causa is based on public policy, and it seems to me plain "on the facts of this case that public policy, far from requiring "that this action shall be dismissed, requires that it shall be "entertained and decided on its merits. The policy of the "Factories Act makes it plain that such a defence as that put "forward here would be inconsistent with the intention of "Parliament." Like him, I cannot believe that a breach of a statutory obligation drafted to ensure the adoption of a careful method of working is a "turpis causa" within the meaning of the rule. Indeed, the adage itself is generally applied to a question of contract and I am by no means prepared to concede where concession is not required that it applies also to the case of a tort. This view is, in my opinion, in conformity with the Law Reform (Contributory Negligence) Act, 1945, which, after enacting that a claim shall not be defeated by reason of the fault of one person where the damage is partly caused by the fault of another, then goes on to define "fault" as meaning "negligence, breach of statutory duty or other act or omission "which gives rise to a liability in tort or would, apart from this "act, give rise to the defence of contributory negligence." In this definition no distinction, at any rate, in terms, is made between a breach of statutory duty which constitutes a criminal

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¹⁰ [1947] K.B. 641, 654; 63 T.L.R. 277; [1947] 1 All E.R. 389.

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offence and that which, if there be such, involves no crime and appears to deal with all types of breach of statutory duty. It may perhaps be enough to quote *Stapley v. Gypsum Mines Ltd.*¹¹ in order to give an instance illustrating a set of facts in which the argument must have prevailed if it had been taken, and indeed in that case it would have been the duty of your Lordships' House to take notice of it, whether pleaded or not.

Finally, the ratio in which the damages are to be attributed to each party comes up for consideration. As a rule an appellate body does not interfere with the discretion exercised by the judge who tried the case. Your Lordships did, however, in *Stapley's* case,¹¹ think that the wide difference between their view and that held in the court of first instance warranted a variation in the proportional amount awarded. In the present case I suggest that the same course should be adopted. Indeed, the case now before the House exhibits, I think, a strong ground for altering the figures inasmuch as the judge made no exact determination, but merely said, in a case in which in his opinion the claim had failed, that he would not give the respondent more than one-half of the damages he would have awarded if he had found any liability.

For my own part I should diminish the total sum by no more than one quarter and award the respondent a sum of £1,800.

LORD OAKSEY. My Lords, I agree. The appellants' contentions in this case were—

(1) that since the respondent, a coal miner, and Williams, a shot-firer, were both guilty of a breach of the statutory duty imposed on shot-firers by regulation 2 (h) of the Explosives in Coal Mines Order, 1934, the appellants were not responsible for the damage suffered by the respondent because it is contrary to public policy that a master should be held responsible for the criminal conduct of his servant either on the ground that such conduct cannot be within the course of his employment or that the maxim *ex turpi causa non oritur actio* is applicable;

(2) that even if this is not so, the conduct of the respondent and Williams was negligence at common law and that even if the appellants are liable for the negligent conduct of Williams, the damage which the respondent suffered was "the result partly "of his own fault" within the meaning of section 1 (1) of the Law Reform (Contributory Negligence) Act, 1945; and

¹¹ [1953] A.C. 663; [1953] 2 All E.R. 478.

(3) that the trial judge's apportionment of the damages in the event of the appellants being held liable should be upheld. H. L. (E.)

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I am of opinion that the appeal must be allowed on the ground that the conduct of the respondent and Williams was negligence at common law, and that the damage the respondent suffered was partly the result of his own fault.

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I think it is true that there may be certain breaches of statutory obligations which do not constitute negligence at common law, but the breach in question was, in my opinion, clearly negligence at common law. No ordinarily prudent miner would usurp the duty of the shot-firer that "he shall himself couple " up the cable to the firing apparatus."

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Any ordinarily prudent miner who was not a novice (and the respondent was not a novice) would, in my opinion, appreciate the danger of allowing two or more people to take part in shot-firing by electricity. Nor can it be suggested that the Coal Mines Act, 1911, or any other Act indicates an intention on the part of the legislature that the penalties imposed should be the only remedy for their breach.

It was argued for the respondent that the statutory duty being imposed directly upon the shot-firer the damage was the result of his fault alone, but the evidence of all the miners called for the respondent and the finding of the trial judge as to the respondent's own knowledge prove that miners are well aware that it is wrong and against the regulations for anyone but a shot-firer to take part in electrical shot-firing.

In this connexion it was argued for the respondent that the evidence as to the practice of miners in helping shot-firers in the way in which the respondent did was evidence of a breach of the employers' obligation to lay down a safe system of working. This was not raised by the pleadings and does not appear to have been argued in the courts below. What was said was that the practice existed, but it was admitted by all, or nearly all, the witnesses that the persons concerned knew it was wrong and that they never did it in the presence of the manager or of sub-managers of the mine. Croom-Johnson J. found that no one in authority knew of the alleged practice and that therefore even if it existed it did not affect the appellants.

On the appellants' first contention I agree with the judgment of Lord Guthrie in *Nicol v. National Coal Board*,¹² which my noble and learned friend, Lord Porter, has cited, that it cannot

¹² 102 L.J.News. 357.

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be said to be necessarily outside the course of the employment of a workman that he performs his work in a manner which is in breach of a statutory regulation. Here it was within the shot-firer's employment to fire the shot electrically, but he did it without due care and in breach of the regulation. Unless there is something in the statute which creates the obligation indicating the intention that no action shall be brought at common law in respect of its breach, the ordinary rules of the common law of tort are applicable, including the doctrine *respondeat superior*.

The maxim *ex turpi causa non oritur actio* is in my opinion inapplicable to the breach of such a statutory obligation as that in question here, and no authority was cited in which the maxim has ever been applied in such circumstances as the present.

The only question which remains to be considered is the question of the apportionment of the damage. Upon this question I agree with my noble and learned friend, Lord Porter, that this is a case in which the trial judge's apportionment seems to me on the whole to give a great deal too much weight to the share of the respondent in the responsibility for the damage and I therefore agree that the respondent should bear one quarter of the damage rather than one half.

LORD REID. My Lords, the respondent was seriously injured by the firing of a shot in his stent in Bwlfa Colliery on January 25, 1950. He and a shotsman, Williams, together did the preliminary work up to the stage of stemming. The regulations required that the shotsman alone should connect the cable wires to the wires from the detonator and perform the rest of the operation necessary for firing the shot. But it appears from the evidence that, unknown to the management, it was in fact a common practice in the mine for the shotsman to leave the miner to connect the cable to the detonator, and on this occasion Williams went off laying the cable, which is about 25 yards long, and left the respondent to make the connexion. The respondent assumed that Williams would warn the men whom he passed when laying the cable but that after connecting the cable he (the respondent) was to warn the men on the other side of the stent: apparently he did not expect the shotsman to return after he had laid the cable. The respondent took some little time to make the connexion and while he was completing this Williams fired the shot.

The shotsman was not called as a witness and we do not know why he fired the shot when he did. He must have supposed that

the respondent and any other men on the far side of the stent had already taken shelter. Whatever his reasons may have been, his act in firing the shot when he did was a grave breach of duty. Regulation 2 (h) of the Explosives in Coal Mines Order, 1934, provides that where shots are fired electrically the shot-firer "shall himself couple up the cable to the fuze or detonator wires and shall do so before coupling the cable to the firing apparatus. . . . He shall also himself couple the cable to the firing apparatus. Before doing so, he shall see that all persons in the vicinity have taken proper shelter." Apart from failing to obey this statutory regulation, Williams was also in my opinion clearly guilty of common law negligence in firing a shot without taking any reasonable steps to see that it was safe to do so. I assume that he could not see whether the respondent had left the stent: if he could he ought to have looked. If he could not see, it was plainly dangerous to depend on hearing a shout or to assume that long enough time had elapsed. It was suggested that Williams might have moved the handle or switch of the firing apparatus accidentally. I do not know whether that is possible, but if it is then it was dangerous to risk such an accident by coupling the cable to the apparatus before seeing that it was safe to fire the shot. And I think that, again apart from the regulations, the respondent failed to take proper care for his own safety. As he did not expect Williams to come back and make certain that he and others beyond him had taken shelter—he said it was his intention after coupling to warn the others—it was obvious and he ought to have realized that his safety depended on Williams not making a mistake in firing prematurely, and that it is easy to make such a mistake if the shot-firer acts on thinking he has heard a shout or on some ground of that kind.

The case for the respondent is simple. His injury was caused by the negligence of Williams: the defence of common employment being no longer available the appellants are responsible to him for damage caused by their servant's negligence: and even if his own negligence contributed to the accident that now only results in a reduction of the amount of damages. The appellants deny liability on three grounds. First, they say that the respondent cannot recover damages because he was injured while committing an offence, and that he would not have been injured if he had not been doing so. Secondly they say, founding on the decision of this House in *Harrison v. National Coal Board*,¹³ that

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¹³ [1951] A.C. 639.

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The appellants found on the maxim *ex turpi causa non oritur actio*. The respondent was committing an offence under the regulations in connecting up the cable and if he had not done so the accident would not have happened. Therefore they say that this action arises *ex turpi causa*. I do not find it necessary to determine the precise meaning or the limits of the application of this maxim because the Law Reform (Contributory Negligence) Act, 1945, enacts (section 1 (1)) that "Where any person suffers "damage as the result partly of his own fault and partly of the "fault of any other person" his claim shall not be defeated by reason of his fault, and section 4 provides that "'fault' means "negligence, breach of statutory duty or other act or omission "which gives rise to a liability in tort or would, apart from this "Act, give rise to the defence of contributory negligence." Reading the appropriate part of this definition back into section 1 makes it provide that where a person suffers damage as the result partly of his own breach of statutory duty which would, apart from this Act, give rise to the defence of contributory negligence his claim shall not be defeated. It was argued for the appellants that this does not apply to a breach of statutory duty which is also an offence because such a breach would not have given rise to the defence of contributory negligence: it would have given rise to the more powerful defence that the action being *ex turpi causa* could not be maintained at all. Even if the appellants were right about the former applicability of the maxim I do not see why a defendant could not rely on the defence of contributory negligence if he chose to do so and not to rely on the defence *ex turpi causa*, and in fact before 1945 when the plaintiff had been guilty of such a breach of statutory duty defendants habitually and often successfully relied on the defence of contributory negligence. Moreover, almost all breaches of statutory duties are offences—counsel for the appellants was unable to mention one which was not—and I cannot read the Act as only referring to those breaches of

statutory duty (if any) which are not offences. So, whatever the former position may have been, it is now in my opinion clear that the appellants cannot rely on this defence.

It was held in *Harrison's* case ¹³ that the regulations which were broken by Williams in this case were personal to the shot-firer, and, as the defence of common employment was still available in that case, that was an end of the case. But in that case counsel for the present appellants dealt with an argument that might be submitted in a case where the defence of common employment was not available, and I set out the argument as I understood it. I understood that the argument was limited to a case where the shot-firer, though in breach of the regulation, had not been guilty of common law negligence. I said ¹⁴: "If his argument is right, whenever a workman is in breach of a statutory duty which is purely personal to the workman it will be necessary to determine whether the workman in failing to carry out his statutory duty was also guilty of negligence at common law. If he was, then his master must answer for his negligence to a fellow servant who had been injured by it. But, if he was not, and his only fault was breach of his statutory duty, then it is said that his master is not answerable for that." I said, and I still say, that if such a case should ever arise I would not dismiss the argument summarily as unworthy of consideration. But this is not such a case: I have already said that in my opinion Williams was guilty of common law negligence. The argument could only arise in this case if these regulations were held to supersede the common law entirely so as to make it irrelevant to consider whether or not the shot-firer was negligent. This was argued by counsel for the appellants, but I can find no basis for the argument. In the ordinary case it is quite clear that safety regulations do not supersede the common law: it has long been the practice to sue alternatively under regulations and at common law, and I am not aware of any case when this has been held to be incompetent—certainly none was cited; and I see no special feature in these regulations which would require such a novel and improbable construction.

It therefore becomes necessary to decide whether the accident was caused wholly by the fault of the respondent or wholly by the fault of Williams or whether it was the result of the fault of both. Certainly both were at fault when it occurred, and it would not have occurred if either had been doing as he ought to have done.

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¹³ [1951] A.C. 639.¹⁴ *Ibid.* 687-8.

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I can see no ground for discarding the fault of Williams as being too remote to be regarded as in law a cause. But the Court of Appeal have held that the fault of the respondent was too remote and that the accident was caused solely by the fault of Williams and, in so holding, they appear to have been greatly influenced by the reasoning of Lord Dunedin in *Smith v. Fife Coal Co. Ltd.*¹⁵ So I must examine that case somewhat closely.

Smith's case¹⁵ was a case under the Workmen's Compensation Act, 1906, so negligence of the workman causing or contributing to the accident was not an answer to the claim. But it had been held that compensation was not due if the accident was caused by the man taking upon himself duties which he had no right to perform and so putting himself outside the sphere of his employment. The only difference between the circumstances in *Smith's* case¹⁵ and those in the present case was that there the man had just finished connecting the cable to the detonator when the shot was fired whereas here he was still finishing that operation—a difference too small to form a distinction, except perhaps in workmen's compensation cases. Lord Dunedin said¹⁶: "In the circumstances I cannot bring myself to see that the efficient cause of the accident was connected with the arrogation of unauthorized duty by the miner. It is true that no explosion could have taken place unless the cable had been connected with the detonator. But that is only a remote causa sine qua non, and one in which the relation of the appellant to the act as distinguished from any other person is immaterial." We might be bound to follow *Smith's* case¹⁷ if the issue to be determined here were the same. But I do not think that it is the same. The question whether the accident arose out of the employment is not the same as whether the accident was caused wholly or partly or not at all by the workman's own acts. In *Smith's* case¹⁷ I do not think that the issue was raised whether the accident was caused partly by the action of the shot-firer and partly by the action of the miner, and I do not think that in this case we are bound by a decision in quite a different field where the present question did not and perhaps could not arise.

In this case I am satisfied that the respondent's injury did result to a substantial degree from his own fault, and therefore he can only succeed by virtue of the provisions of the Law Reform (Contributory Negligence) Act, 1945: his claim is not defeated but the damages recoverable must be "reduced to such extent as the

¹⁵ [1914] A.C. 723.¹⁶ Ibid. 729.¹⁷ [1914] A.C. 723.

" court thinks just and equitable having regard to the claimant's " share in the responsibility for the damage " (section 1 (1)). It appears to me that Williams' share in the responsibility was much greater than the respondent's share. I do not attach importance to the practice in this mine of disregarding the regulations: if that affords any excuse the excuse is available to Williams as well as to the respondent. And I do not put much weight on the fact that the duties under the regulations were primarily the personal responsibility of the shot-firer. But I think that firing the shot without making certain that all in the vicinity had taken shelter was much more culpable and more directly connected with the accident than anything which the respondent did, and I would hold that Williams' share in the responsibility for the damage was three times as great as the respondent's share.

Croom-Johnson J. decided the case in favour of the appellants on an application of *Harrison's case*,¹⁸ but he added at the end of his judgment: " If I were able to hold the defendants " responsible for Williams' breach of duty, I should not have " assessed the plaintiff's damages at more than one-half of the " total amount he lost." It is not right to disturb such a finding lightly, but it appears to me that the difference between holding the parties equally to blame and holding the one's share of responsibility to be three times that of the other is so substantial that we should give effect to it. The damages awarded by the Court of Appeal cannot stand because their award was on the basis that Williams' fault was the sole cause of the accident. I would reduce the damages from £2,400 to £1,800.

LORD TUCKER. My Lords, I agree that for the reasons which have been stated by your Lordships this appeal should be allowed to the extent that the damages awarded by the Court of Appeal should be reduced on the ground of the plaintiff's contributory negligence, and that the maxim " *ex turpi causa non oritur actio* " has no application to a case such as this.

As to the proposed apportionment, however, I can find no grounds for holding that the judge at the trial, who provisionally fixed the proportions at 50 per cent., did not give proper consideration to all relevant matters both as regards causation and blameworthiness, and consequently, having regard to what has so often been said in this House as to the proper functions of appellate courts in such matters, I would have thought that,

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unless your Lordships' conclusions with regard to liability were based on findings of fact different from those of the trial judge, the proper course would have been to accept his apportionment notwithstanding that your Lordships might consider different proportions more appropriate.

I would add that I can see no reason why a provisional assessment or apportionment of damages should be treated differently from one which forms part of an actual judgment.

LORD ASQUITH OF BISHOPSTONE. My Lords, I agree, and have little to add. It seems to me perfectly clear that the board was vicariously liable at common law for their shot-firer's negligence, and that there is no substance in the contention that the shot-firer, in firing the shot as he did, was acting outside the scope of his employment. He was employed to fire shots, and he fired a shot in a negligent, improper and prohibited manner: he did not do an act of a class which he was not employed to do at all.

The point which exercised some of your Lordships, and certainly myself, was the argument that the plaintiff and the defendant's shot-firer were parties to an agreement in breach of the regulations whereby they agreed that the plaintiff should couple the electric leads with the detonators, a function committed by the regulations to the sole province of the shot-firer; and that the damage which followed resulted from that illegal agreement. The defendants relied on the maxim "ex turpi causa non oritur actio" as absolving them of liability.

The short answer to this contention has no doubt been found by those of your Lordships who pointed out the definition of "fault" in the Law Reform (Contributory Negligence) Act, 1945. But for myself I should have decided in the same sense in the absence of any such definition. The vast majority of cases in which the maxim has been applied have been cases where, there being an illegal agreement between A and B, either seeks to sue the other for its enforcement or for damages for its breach. That, of course, is not this case. Cases where an action in tort has been defeated by the maxim are exceedingly rare. Possibly a party to an illegal prize fight who is damaged in the conflict cannot sue for assault (*Boulter v. Clark*¹⁹). But it seems to me in principle that the plaintiff cannot be precluded from suing simply because the wrongful act is committed after the illegal agreement is made and during the period involved in its execution.

¹⁹ (1747) Bull.N.P. 16.

The act must, I should have supposed, at least be a step in the execution of the common illegal purpose. If two burglars, A and B, agree to open a safe by means of explosives, and A so negligently handles the explosive charge as to injure B, B might find some difficulty in maintaining an action for negligence against A. But if A and B are proceeding to the premises which they intend burglariously to enter, and before they enter them, B picks A's pocket and steals his watch, I cannot prevail on myself to believe that A could not sue in tort (provided he had first prosecuted B for larceny). The theft is totally unconnected with the burglary. There is, however, a surprising dearth of authority on this point. Certain cases were cited to us decided under the Factory Acts, but none of them was to my mind really in point.

My Lords, I agree that the order of the Court of Appeal should be varied in so far as it awards to the plaintiff the whole of his damages. I would, if the matter had been before me at first instance, have awarded him two-thirds, as the shot-firer was, to my mind, about twice as negligent as the plaintiff. But I differ from the majority of your Lordships inasmuch as I do not think that the disparity between 50 per cent. (the judge's figure) and 66 per cent. is sufficient to justify the disturbance of his percentage on the ground that it is wholly inordinate.

Appeal allowed.

Solicitors: *Donald H. Haslam for W. H. F. Barklam, Cardiff; Theodore Goddard & Co. for Morgan, Bruce & Nicholas, Pontypridd.*

[HOUSE OF LORDS.]

CHAPMAN AND OTHERS APPELLANTS; H. L. (E.)*

AND

CHAPMAN AND OTHERS RESPONDENTS. 1954
Feb. 8, 9,
11, 12, 16;
Mar. 25.

Trust and Trustee—Scheme to avoid tax—Jurisdiction of court to sanction—Modification of beneficial rights—Inherent equitable jurisdiction—Statutory jurisdiction—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 64—Trustee Act, 1925 (15 Geo. 5, c. 19), s. 57.

Settlement. Revenue—Tax avoidance scheme.

* *Present: LORD SIMONDS L.C., LORD OAKSEY, LORD MORTON OF HENRYTON, LORD ASQUITH OF BISHOPSTONE and LORD COHEN.*

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A judge of the Chancery Division has no inherent jurisdiction, in the execution of the trusts of a settlement, to sanction, on behalf of infant beneficiaries and unborn persons, a rearrangement of the trusts of that settlement for no other purpose than to secure an adventitious benefit (e.g., that estate duty payable in a certain event will, in consequence of the rearrangement, not be payable in respect of the trust funds).

Per Lord Simonds L.C., Lord Morton of Henryton and Lord Asquith of Bishopstone. The power of the court to sanction a compromise by an infant in a suit to which he is a party cannot be extended to cover cases in which there is no real dispute as to rights but in which it is sought by way of bargain between the beneficiaries to rearrange the beneficial interests under the trust instrument and to bind infants and unborn persons.

Per Lord Cohen. The jurisdiction of the court extends to compromises in the wider sense between tenants for life on the one hand and remaindermen on the other, but not to varying rights inter se of parties whom the testator has put on an equality.

In re Downshire Settled Estates and *In re Blackwell's Settlement Trusts* [1953] Ch. 218; [1953] 1 All E.R. 103 considered.

Decision of the Court of Appeal (sub nom. *In re Chapman's Settlement Trusts, Chapman v. Chapman*) [1953] Ch. 218; [1953] 1 All E.R. 103 affirmed.

APPEAL from the Court of Appeal (Evershed M.R. and Romer L.J., Denning L.J. dissenting).

This was an appeal from an order of the Court of Appeal dated December 17, 1952, dismissing an appeal by the appellants, Sir Robert Chapman, Dame Helene Paris Chapman and Anthony John Aglin, from an order of the Chancery Division (Harman J.) dated July 28, 1952, which dismissed an application by them as trustees of certain settlements for leave to execute a scheme of family arrangement affecting the trust property or, alternatively, to release the trust property from certain trusts subsisting under the settlements.

The facts, stated by Lord Morton of Henryton, were as follows: The application related to three separate settlements. The first of those settlements was dated March 15, 1944, and is hereafter referred to as "the 1944 settlement." The settlors were Col. Robert Chapman and his wife (now Sir Robert and Lady Chapman). Clauses 2, 3 and 4 of the 1944 settlement were as follows:—

"2. The trustees shall stand possessed of the trust premises (subject to clauses 3 and 4 following) for all or any the child or children of the settlors' son Robert Macgowan Chapman who shall attain the age of twenty-one years or die under that age

“ leaving issue and if more than one in equal shares as tenants in common.” H. L. (E.)

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“ 3. Provided always that until the youngest child of the said Robert Macgowan Chapman shall have attained the age of twenty-five years if that event shall happen within twenty-one years from the date hereof or until the expiration of twenty-one years from the death of the survivor of the settlors if the youngest surviving child of the said Robert Macgowan Chapman shall not then have attained the age of twenty-five years the trustees shall retain the trust premises and shall apply such part as they in their discretion shall think fit of the income thereof for or towards the common maintenance education or other benefits of the children of the said Robert Macgowan Chapman for the time being living whether minors or adults or for or towards the maintenance education or other benefit of any one or more of them to the exclusion of the other or others and shall (subject as hereinafter mentioned) accumulate the surplus of such income until the time for distribution by investing the same and the resulting income thereof in any investments hereby authorized in augmentation of the capital of the trust premises to be held upon the same trusts as the original trust premises but so that the trustees may apply the accumulations of any preceding year or years in or towards the maintenance education or benefit of all or any of the said children in the same manner as such accumulations might have been applied had they been income arising from the original trust funds in the then current year. Provided always that after each child of the said Robert Macgowan Chapman has attained his or her majority the surplus income of his share in the trust premises not expended by virtue of the foregoing powers of this clause shall not be accumulated but shall be paid to such child.”

“ 4. Provided also that the trustees may at any time with the consent in writing of the settlors raise any part or parts not exceeding in the whole one half of the then expectant or presumptive or vested share of any child whether minor or adult of the said Robert Macgowan Chapman in the trust premises under the trust hereinbefore contained and pay or apply the same to him or her or for his or her advancement or otherwise for his or her exclusive benefit in such manner as the trustees shall think fit and as to the part or parts so raised the maintenance and other trusts of the last preceding clause shall cease to be

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The remaining clauses of the settlement were administrative and were not relevant for the purposes of the appeal.

By the second settlement, dated February 8, 1950, and hereafter referred to as “ the 1950 settlement,” Lady Chapman settled certain further funds on substantially the same trusts for the benefit of Robert Macgowan Chapman’s children as those declared by the 1944 settlement. In particular, the provisions for common maintenance and accumulation contained in clause 3 of the 1944 settlement were repeated by clause 4 of the 1950 settlement save that the reference in the former clause to the expiration of 21 years from the death of the survivor of the settlors was altered in the latter clause to the expiration of 21 years from the death of Lady Chapman.

By the third settlement, dated February 10, 1950 (hereafter referred to as “ the Nicholas settlement ” and made upon the marriage of Henry James Nicholas Chapman with Anne Barbara Croft), Lady Chapman settled certain funds upon trusts for the benefit of the children of that marriage and of the husband and the wife or (if none of such children attained a vested interest) then upon similar trusts for the benefit of the children of Nicholas by any subsequent marriage, and of Nicholas and any subsequent wife, and it was provided (clause 4) that in the event of the determination or failure of such trusts the trustees should pay over the trust funds (subject as therein mentioned) to the trustees of the 1950 settlement to be held by them upon the trusts of that settlement.

Robert Macgowan Chapman (who was the son of Sir Robert and Lady Chapman) has been married once, namely, to his present wife, Barbara May Chapman, and there have been three children of the marriage, namely, the defendants David Robert Macgowan Chapman, who was born on December 16, 1941, Peter Stuart Chapman, who was born on August 24, 1944, and Elizabeth Mary Chapman, who was born on May 11, 1946. There has been no issue as yet of the marriage between Mr. Henry James Nicholas Chapman (who was also a son of Sir Robert and Lady Chapman) and his wife Anne Barbara.

As at March 24, 1952, the estimated values of the funds comprised in the three settlements were respectively as follows: The 1944 settlement £43,000, of which £27,700 was settled by Sir Robert, and £15,600 by Lady Chapman; the 1950 settlement £14,700; and the Nicholas settlement £19,600. By reason of

the discretionary trusts for the common maintenance of Robert Macgowan Chapman's children contained respectively in clause 3 of the 1944 settlement and clause 4 of the 1950 settlement the trustees of those settlements were advised that, except in certain unlikely events, a claim for estate duty would arise in respect of the funds comprised in the former settlement on the death of the survivor of Sir Robert (now aged 72) and Lady Chapman (now aged 65), and in respect of the funds comprised in the latter settlement upon the death of Lady Chapman. Further, the trustees of the Nicholas settlement were advised that if the substitutive limitation contained in that settlement, and before referred to, was valid and should become effective, a claim for estate duty would arise in respect of their funds by reason of that limitation. If the present rates of estate duty remained unchanged it was estimated that nearly £30,000 would be exigible for duty in respect of the three trust funds whether Sir Robert survived or predeceased Lady Chapman.

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In those circumstances a scheme of arrangement was prepared the object of which was to avoid the expected claims for duty on the deaths of Sir Robert and Lady Chapman. That object could only be achieved by freeing the 1944 and 1950 settlement funds from the provisions for common maintenance contained in clauses 3 and 4 of those settlements respectively. It was accordingly proposed that the trustees of those settlements should, with the sanction of the court, advance their respective funds to the trustees of a new settlement which was to be entered into containing similar trusts, but omitting those provisions, and that the trustees of the Nicholas settlement should, on the failure of the trusts therein contained for the benefit of Nicholas Chapman and his present and any future wife and issue similarly transfer their fund to the trustees of the proposed new settlement to be held upon the trusts thereof.

Harman J. dismissed the application. The Court of Appeal affirmed his decision. The trustees of the settlements appealed to the House of Lords.

J. Neville Gray Q.C. and *J. A. Armstrong* for the appellants, trustees of the settlements. It would be disastrous for the infants if these clauses should stand: see *In re Hodson's Settlement*.¹ The appellants seek an order authorizing them as trustees of the settlements to release all property which is now or may hereafter

¹ [1939] Ch. 343; 55 T.L.R. 357; [1939] 1 All E.R. 196.

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become subject to the trusts from the trusts declared by clause 3 of the 1944 settlement and clause 4 of the 1950 settlement, to the intent that the trust premises shall after the release be held in the case of the settlement of 1944 on the trusts declared by clause 2 thereof and in the case of the settlement of 1950 on the trusts declared by clause 3 thereof. Admittedly, apart from the effect on death duties liability, the result of the alteration would be a gamble and one could not tell which way the benefit would be.

The starting point of the appellants' argument is Underhill on Trusts, 9th ed. (the last for which the author himself was responsible), p. 244, para. 46. Their argument may be summed up as follows: (1) The relief sought is for the benefit of the infant respondents and all other persons who may be or become interested under the trusts of the settlements and to the detriment of no one interested in or concerned with the settlements; in such circumstances the court has for 300 years past had, and still has, power to alter the trusts of a settlement for the benefit of infant beneficiaries. (2) (a) The Chancery Division exercises the powers always recognized as being in the Sovereign as *parens patriae* to protect property rights and interests of an infant as a person incapable of doing so himself. (b) The exercise of such powers involves (*inter alia*) the making or sanctioning on behalf of an infant of contracts (whether with other infants or with persons *sui juris* or both) dealing with or affecting his property rights and interests where it is clearly beneficial to the infant that they should be dealt with in a particular manner. (c) It is within the jurisdiction of the Chancery Division to make or sanction on behalf of each infant in this case the beneficial bargain to which (through the incapacity which, purely as a measure protective of his interests, the law lays on him) he cannot bind himself. (3) The jurisdiction extends, and must logically extend, beyond infants to unborn persons, who are equally incapable of protecting their interests, and it would be manifestly wrong to assert a beneficent jurisdiction in respect of an infant immediately after birth and deny it to the same infant in the womb.

The earliest example of the exercise of this jurisdiction is *Earl of Winchelsea v. Norcliffe*.² See also *Pierson v. Shore*³; *Inwood v. Twyne*⁴ and *Ex parte Grimstone*.⁵

For the purposes of the present argument there is no difference

² (1687) 1 Vern. 435.

³ (1739) 1 Atk. 480.

⁴ (1762) Amb. 417.

⁵ (1772) Amb. 706, 707.

between the case of a will and a settlement, save that a settlor's strongly expressed wish would help the court in deciding what was for the infant's benefit.

The court has a wide general jurisdiction which in practice it now exercises on certain definite lines, all examples of that jurisdiction. The Court of Chancery and its successor the Chancery Division has had for a very long time an inherent jurisdiction to make such an order as is now sought, provided all persons sui juris, who are interested, agree, and it is clearly for the advantage or convenience of infants and persons unborn or not presently ascertainable whose interests are affected. Subject to this, there is no limit to the jurisdiction. One cannot draw a line between the court's general jurisdiction and its jurisdiction to sanction compromises.

Examples of the court's attitude to this jurisdiction are found in the following cases: *Bridges v. Bridges*⁶; *Ashburton (Lord) v. Ashburton (Lady)*⁷; *Ex parte Phillips*⁸; *Brooke v. Lord Mestyn*⁹; *In re Jackson*¹⁰; *Englefield v. Englefield*¹¹; *Revel v. Watkinson*¹²; *Greenwell v. Greenwell*¹³; *Allan, In re, Havelock v. Havelock*¹⁴; *In re Collins*¹⁵; *In re Alford*¹⁶; *In re Crawshaw*¹⁷; *In re Morison*¹⁸; *In re Walker*¹⁹; *In re New*²⁰; *In re Trenchard*²¹; *In re Wells*²²; *In re Tollemache*²³; *In re Duke of Leeds*.²⁴

One may group into four classes the instances of the general inherent jurisdiction of the court and the way it is exercised according to the different lines which have been followed: (1) cases in which the court has effected changes in the nature of an infant's property, as by directing investment of his personalty in the purchase of freeholds; (2) cases in which the court has allowed maintenance out of income which the settlor or testator directed to be accumulated; in some cases the order resulted in the alteration of beneficial interests, since the income was applied in maintenance instead of being accumulated or applied in reducing incumbrances; (3) cases in which the court has approved of a

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⁶ (1752) 12 App.Cas. 693n.⁷ (1801) 6 Ves. 6.⁸ (1812) 19 Ves. 118, 122.⁹ (1864) 2 De G.J. & S. 373, 415.¹⁰ (1882) 21 Ch.D. 786.¹¹ (1691) 2 Vern. 235.¹² (1748) 1 Ves.Sen. 93.¹³ (1800) 5 Ves. 194, 199.¹⁴ (1881) 17 Ch.D. 807.¹⁵ (1886) 32 Ch.D. 229.¹⁶ (1886) 32 Ch.D. 383.¹⁷ [1888] W.N. 246; 60 L.T. 357.¹⁸ [1901] 1 Ch. 701.¹⁹ [1901] 1 Ch. 879.²⁰ [1901] 2 Ch. 534.²¹ [1902] 1 Ch. 378.²² [1903] 1 Ch. 848.²³ [1903] 1 Ch. 457, 955.²⁴ [1947] Ch. 525, 556-7; 63 T.L.R. 547; [1947] 2 All E.R. 200.

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compromise on behalf of infants and possible after-born beneficiaries; (4) cases of salvage where some unforeseen development unprovided for by the settlor or testator threatens to wreck his intentions and the court authorizes some transaction unauthorized by the trust, so as to avoid a situation which would be completely ruinous. Examples of the first group are to be found in *Taylor v. Philips*²⁵; *Drury v. Drury*²⁶; *Earl of Buckinghamshire v. Drury*²⁷; *Field v. Moore*²⁸; *Calvert v. Godfrey*²⁹; *Johnstone v. Baber*³⁰ and *Garmstone v. Gaunt*.³¹ Examples of the second group are to be found in *Fentiman v. Fentiman*³²; *In re Howarth*³³; *In re Hamilton*³⁴; *De Witte v. Palin*³⁵; *Errat v. Barlow*³⁶; *Haley v. Bannister*³⁷ and *Marshall v. Holloway*.³⁸ As to the third group, see *Earl of Buckinghamshire v. Drury*³⁹; *Taylor v. Philips*⁴⁰; *Brooke v. Lord Mostyn*⁴¹; *In re Trenchard*⁴²; *In re Wells*⁴³; *In re Duke of Leeds*⁴⁴ and *In re Lucas*.⁴⁵ As to the fourth group, see *In re New*⁴⁶ and also section 57 of the Trustee Act, 1925. See also *D'Eyncourt v. Gregory*⁴⁷ and *In re Montagu*.⁴⁸

The court has on occasion in the course of the nineteenth century wrongly imposed limitations on its jurisdiction, but the cases which the court below regarded as exceptions were in truth examples of the unlimited jurisdiction of the court. The conclusions to be drawn from the cases are that (a) the court can override the wishes of adult beneficiaries only in salvage cases, and (b) while the court does not alter trusts as such, it can and does do so as a matter incidental to its jurisdiction to alter an infant's interests under a trust.

Charles Russell Q.C. and *J. A. Wolfe* for the respondents, Robert Macgowan Chapman and Henry James Nicholas Chapman, trustees of the settlements, and David Robert Macgowan Chapman, Peter Stuart Chapman and Elizabeth Mary Chapman, infants contingently entitled under the settlements. If these

²⁵ (1750) 2 Ves.Sen. 23.

²⁶ (1761) 2 Eden 39.

²⁷ (1761) 2 Eden 60, 69.

²⁸ (1855) 7 De G.M. & G. 691, 697,
709.

²⁹ (1843) 6 Beav. 97, 106.

³⁰ (1845) 8 Beav. 233.

³¹ (1845) 1 Col.C.C. 577, 580.

³² (1842) 13 Sim. 171.

³³ (1873) L.R. 8 Ch. 415, 416-7.

³⁴ (1885) 31 Ch.D. 291.

³⁵ (1872) L.R. 14 Eq. 251, 252.

³⁶ (1807) 14 Ves. 202.

³⁷ (1819) 4 Madd. 275.

³⁸ (1818) 2 Swanst. 432, 436.

³⁹ 2 Eden 60.

⁴⁰ 2 Ves.Sen. 23.

⁴¹ 2 De G.J. & S. 373.

⁴² [1902] 1 Ch. 378.

⁴³ [1903] 1 Ch. 848.

⁴⁴ [1947] Ch. 525.

⁴⁵ [1947] Ch. 558.

⁴⁶ [1901] 2 Ch. 534.

⁴⁷ (1876) 3 Ch.D. 635.

⁴⁸ [1897] 2 Ch. 8.

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infants were of full age they could sit round a table and deal with the beneficial interests as they thought fit and no one could say they may if they wished to alter the beneficial trusts. But the law imposes on them a disability because of infancy and they cannot by themselves enter into this contract. The question is this: is there or is there not a power in the Court of Chancery to save them from this disability, the whole object of which is to protect them? Are they to be throttled by the straps which bind them to the infants' chair? In truth the law does supply a jurisdiction to avoid this position, even if there be no general jurisdiction in the court to vary trusts. The court on behalf of an infant is able, when it is plainly beneficial to the infant, to deal with his interest in trust property (e.g., by changing one type of beneficial interest for another). This is not invoking as such a jurisdiction to alter trusts; it is to concur on behalf of infants in arrangements the result of which may well be an alteration in the beneficial trusts. Any change in beneficial interests can only be achieved by changing the trusts. There is no sanctity in the wishes of a settlor who has conferred the total beneficial interest on a group to the exclusion of himself, and there is nothing objectionable as such in the thought of altering a trust.

As to the compromise cases, there is no doubt that in the case of wills and settlements when one of the parties before the court is an infant and it is suggested that the matter in dispute be compromised by giving a particular reading to the trust instrument in the case, the court, acting on behalf of infants and unborn persons, can sanction the compromise. This jurisdiction was exercised both by the old Court of Chancery and the Chancery Division. The basis of the court's jurisdiction to bind the parties to that arrangement can only be that it is protecting the infants because of their inability to enter into the bargain for themselves. The court is dealing pro tanto with the infants' beneficial interest. In there is a doubt, on the construction of the document, what is the infant's interest and a certain construction is agreed on by way of compromise, that generally involves an alteration of the interest. If the dispute had been fought out one alternative or another might have been chosen, but in the case of a compromise the court agrees that the interest shall be changed. In that case there are found all the elements present in this case, in particular the power to bind the infant by altering the nature of his interest in the trust fund where it is obviously for his benefit to do what

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he would do if he were of full age. Modern cases like *In re Wells* ⁴⁹ and *In re Trenchard* ⁵⁰ supply examples of the courts accepting that the true principle of the compromise cases is equally applicable where there is no doubt as to the construction of the document.

The present case is not one of compromise of doubt or dispute. The court is simply dealing with the beneficial interest of the infant under the trust on the basis that the court has power to deal with the infant's property when he cannot deal with it himself. There is no reason why the jurisdiction should not extend to such a case. *In re New* ⁵¹ shows that the court's jurisdiction can be exercised, in the face of opposition by beneficiaries, on the ground of salvage. It is not contended that there is a wide jurisdiction enabling the wishes of the adult beneficiaries to be overridden. That is why, in this case, one is so near to the compromise cases. It is a rearrangement of the trusts by mutual consent, the court consenting for those who cannot do so for themselves; the court is not claiming an overriding power to rewrite the trusts: see *Johnstone v. Baber*.⁵² Apart from compromise, there are other instances in which the courts have acted beneficially for infants. *Brooke v. Lord Mostyn* ⁵³ is a true compromise case. See also *Buckmaster v. Buckmaster* ⁵⁴; *Seaton v. Seaton* ⁵⁵; *In re Trenchard* ⁵⁶; *In re Wells* ⁵⁷; *In re Duke of Leeds* ⁵⁸; *In re Lucas* ⁵⁹; *Taylor v. Philips*.⁶⁰ Apart from the maintenance cases, the extension of the compromise principle to rearrangement starts with *In re Trenchard*,⁶¹ where the court only sanctioned the purchase of the rights of the testator's widow by the trustees. *In re Wells* ⁶² is an example of rearrangement in the interests of the infants.

X It is admitted that apart from the benefit to the estate as regards liability for death duties it is impossible to say which way the benefit resulting from the alteration would go. Cases like this relating to death duties may come within the principle of the salvage cases, since unless the trusts at present expressed are departed from half the trust funds will disappear from the estate. As to modification of trusts see also Underhill on Trusts, 10th ed., p. 428, art. 69.

⁴⁹ [1903] 1 Ch. 848.

⁵⁰ [1902] 1 Ch. 378.

⁵¹ [1901] 2 Ch. 534.

⁵² 8 Beav. 233.

⁵³ 2 De G.J. & S. 373.

⁵⁴ (1887) 35 Ch.D. 21.

⁵⁵ (1888) 13 App.Cas. 61.

⁵⁶ [1902] 1 Ch. 378.

⁵⁷ [1903] 1 Ch. 848.

⁵⁸ [1947] Ch. 525, 556-7.

⁵⁹ [1947] Ch. 558.

⁶⁰ 2 Ves.Sen. 23.

⁶¹ [1902] 1 Ch. 378.

⁶² [1903] 1 Ch. 848.

Since no rights are in dispute arrangements such as the one here proposed are not compromises in the strict sense, but they are compromises in the broader sense of the word envisaged in this case in the Court of Appeal. Assuming that it rightly decided *In re Downshire Settled Estates*,⁶³ the present case is indistinguishable from it. None of the cases then before the court was a case of disputed rights. Each resulted in an alteration in the beneficial interests under a settlement made for the same reason, to reduce liability to taxation. No scheme of this character has ever been refused.

J. A. Wolfe following. The position in *In re Lucas*,⁶⁴ where questions arose as to the apportionment of compensation under the Coal Act, 1938, was that there were minors interested. The position was similar in *In re Duke of Leeds*.⁶⁵ On the question of the destination Jenkins J. decided that in the one case the whole and in the other a large part of the moneys should be invested and paid in instalments by way of annuities to successive tenants for life. Compromises were subsequently sanctioned by the court under which a slice of capital was paid to the tenant for life out of the compensation moneys and the balance was to be treated as capital and held on the appropriate trusts. The infants were interested parties. See also *In re Schofield's Will Trusts*.⁶⁶

Denys Buckley for the Attorney-General as *amicus curiae*. Two separate and distinct jurisdictions are relevant in connexion with this problem, (1) the court's ancient jurisdiction in respect of infants' property, and (2) the control of trustees in the execution of trusts.

It was argued for the appellants that the court, on behalf of an infant, can enable him to enter into any bargain notwithstanding that it may alter a trust. This is contrary to all the history of the law of infants' contracts. There is nothing in the books to suggest that such a general power resides in the court. See *Field v. Moore*.⁶⁷ Thus, on the old principles of the law the court would not allow the conversion of realty into personalty because of interfering with the descent of the land. The argument for the Attorney-General on this point is summed up in *Simpson on Infants*, 4th ed., pp. 223-4, quoting *Mathew v. Brise*,⁶⁸ *Taylor v. Philips*⁶⁹ and *Calvert v. Godfrey*.⁷⁰ This indicates that there

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⁶³ [1953] Ch. 218; [1953] 1 All E.R. 103.

⁶⁴ [1947] Ch. 558.

⁶⁵ [1947] Ch. 525.

⁶⁶ [1949] Ch. 341.

⁶⁷ (1855) 7 De G.M. & G. 691, 702-3, 706-7, 708, 709, 710.

⁶⁸ (1851) 14 Beav. 341, 345.

⁶⁹ 2 Ves.Sen. 23.

⁷⁰ (1843) 6 Beav. 97.

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As to the jurisdiction which the court exercises over trustees, they are the legal owners of the property and at law they could do what they liked with it, but the court of equity would not let them do anything contrary to the trust imposed on them by the settlement and would not authorize them to commit a breach of trust because it had no jurisdiction to do so: see *Johnstone v. Baber*,⁷¹ *D'Eyncourt v. Gregory*⁷² and *In re Tollemache*.⁷³

The principle which justifies the salvage cases is sanctioning not something contrary to the terms of the trust but something neither forbidden nor authorized by the trust which is within the presumed intention of the trust and the presumed intention of the testator: see *In re New*.⁷⁴ It must be implied in every trust that the trustees will do their best to preserve the value of the estate, and if something can be done which, though not authorized by the trust instrument, is not forbidden, the court will authorize it. Thus in *Revel v. Watkinson*⁷⁵ the testator cannot have intended that during the accumulations the beneficiary should be left without any support. *Havelock v. Havelock*⁷⁶ is not far from the principle of *In re New*⁷⁷ in that it was dealing with something which the testator did not foresee but on which one could be sure what his view would have been. Trusts for accumulation have been unpopular with the court and have been treated in a special way. *In re Walker*⁷⁸ is instructive: it supports the general proposition that the court will not contradict the express provisions of a trust nor override them, save perhaps in the case of accumulations, but will have regard to the paramount intention of the testator or settlor. One can fit the salvage and maintenance cases into this scheme. In *Errat v. Barlow*⁷⁹ the court expressly refused to sanction maintenance because it would result in giving the infant the property of someone else. It shows that the court will not override the express intention of a settlor. *In re Trenchard*⁸⁰ has many of the characteristics of the salvage cases. The arrangement depended on the bargain made by the trustees with the widow and it was for the benefit of the estate. Counsel for the applicant relied on *In re New*.⁸¹ *In re Wells*⁸² is really explained on the ground that the effect of the scheme

⁷¹ 8 Beav. 233.

⁷² 3 Ch.D. 635.

⁷³ [1903] 1 Ch. 457.

⁷⁴ [1901] 2 Ch. 534, 544-5.

⁷⁵ 1 Ves.Sen. 93.

⁷⁶ 17 Ch.D. 807, 813, 816-7.

⁷⁷ [1901] 2 Ch. 534.

⁷⁸ [1901] 1 Ch. 879, 885.

⁷⁹ 14 Ves. 202.

⁸⁰ [1902] 1 Ch. 378.

⁸¹ [1901] 2 Ch. 534.

⁸² [1903] 1 Ch. 848.

was to put an end to all the trusts in the head settlement and to substitute in the sub-settlements vested interests for contingent interests. Beneficiaries can end a settlement but cannot give it a new face.

Reliance is placed on *Peto v. Gardner*⁸³ and *Day v. Day*.⁸⁴

It would be hard for the court to say (apart from considerations of estate duty) that this arrangement would be beneficial to the infants, because if it worked out for the benefit of A it would be counterbalanced by detriment to B. As to the estate duty point, the court must be satisfied that an arrangement proposed is for the benefit of the infants, but if, when Lady Chapman died, estate duty were at a lower rate, it might not prove to be so.

There is no general jurisdiction in the court to sanction contracts on behalf of infants, and it cannot sanction this sort of transaction. It will only authorize transactions required by the circumstances and not foreseen or reasonably foreseeable when the settlement was made. In respect of such transactions the court will only act in accordance with what it can regard as the paramount intention of the settlor and will not act in contradiction to the express provisions of the trust. If the appellants' wider proposition were right many of the cases would have been decided more simply, or otherwise, than they were: see *D'Eyncourt v. Gregory*⁸⁵; *In re Crawshay*⁸⁶; *In re Morison*⁸⁷; *In re Montagu*⁸⁸; *In re Walker*⁸⁹; *In re New*⁹⁰; *In re Tollemache*⁹¹; *Calvert v. Godfrey*.⁹²

There are grounds for distinguishing this case from *In re Downshire Settled Estates*,⁹³ in which the settlement was made in 1915 when the estate duty rates were lower than now, on the ground that the change of circumstances might give the court jurisdiction on salvage lines. Also in that case something substantial was being given up to the infants.

Charles Russell Q.C. in reply. There is a power in the court to approve a compromise on behalf of infants or unborn persons in the case of property subject to a trust, for an infant is not to be deprived of a manifest benefit because of an incapacity which the law lays on him. Every reason which justifies on any principle the approval by the court on behalf of infants or unborn

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⁸³ (1843) 2 Y. & C.C.C. 312.⁸⁴ (1845) 1 Holt Eq. 223.⁸⁵ 3 Ch.D. 635.⁸⁶ 60 L.T. 357.⁸⁷ [1901] 1 Ch. 701.⁸⁸ [1897] 2 Ch. 8.⁸⁹ [1901] 1 Ch. 879.⁹⁰ [1901] 2 Ch. 534.⁹¹ [1903] 1 Ch. 457.⁹² 6 Beav. 97.⁹³ [1953] Ch. 218.

H. L. (E.) persons of a compromise of doubts involving a rearrangement of their beneficial interests is also present when a trust is before the court without there being any dispute as to the beneficial interests inter se, but a rearrangement of them would lead to a manifest benefit to the infant. In this respect there is no difference between a case where there are disputed or doubtful beneficial rights and a case where there is no doubt. It would be startling if the jurisdiction depended on the existence of a doubt, possibly a small one, as to the scope of the beneficial interests, and the deliberate insertion of "doubt" clauses might be the result of such a halting of "the measured march of equity." There is no justification for saying that the power of the court to aid an infant or unborn person is limited to cases of doubt. Every ground, whichever way one looks at it, for saying that the court can bind an infant in a case of doubt as to his beneficial interest is available where there is no doubt. The court is seised of the trust and in control of the trustees, the adults agree and the only thing remaining necessary is the power to bind the infants for their manifest benefit. The infant should not be ruined by the principle adopted for his own protection. He is bound for his own protection, and it would be surprising if the court could not loose the bond when a proposal was made for his manifest benefit, since admittedly it can save him when once there is a lis. Further, one can always bring the execution of a trust before the Chancery Court. The true view is that, on the one hand, there is a limited jurisdiction to authorize dealings by trustees with the constituents of the trust fund, if need be contrary to the wishes of a beneficiary (see *In re New*⁹⁴ and *In re Tollemache*⁹⁵ extended by the Trustee Act, 1925, s. 57), and, on the other hand, an unlimited jurisdiction to sanction on behalf of infants an agreement affecting beneficial interests in those constituents.

Their Lordships took time for consideration.

March 25. LORD SIMONDS L.C. My Lords, this appeal raises questions of considerable importance and for that reason, though I have had the privilege of reading the opinion which my noble and learned friend, Lord Morton of Henryton, is about to deliver and agree with it in its reasoning and conclusions, I think it desirable to make some observations upon the main argument of the appellants. By way of preliminary explanation, it is only

⁹⁴ [1901] 2 Ch. 534.

⁹⁵ [1903] 1 Ch. 457.

necessary to say that your Lordships are invited to hold that a judge of the Chancery Division of the High Court of Justice has an inherent jurisdiction in the execution of the trusts of a settlement to sanction on behalf of infant beneficiaries and unborn persons a rearrangement of the trusts of that settlement for no other purpose than to secure an adventitious benefit which may be and, in the present case, is, that estate duty, payable in a certain event as things now stand, will, in consequence of the rearrangement, not be payable in respect of the trust funds.

This argument, which found favour with Denning L.J., is based, as I understand it, on two separate lines of thought which are for this purpose blended. On the one hand it is said that the Chancellor, the Court of Chancery and the Chancery Division of the High Court of Justice, exercising in turn on behalf of the Sovereign as *parens patriae* a peculiar jurisdiction over infants, had and has power to dispose of an infant's property in any manner beneficial to him in which he, if of full age, could have disposed of it; and, on the other hand, it is said that the same court, whose duty it has been for some centuries to execute and administer trusts, has jurisdiction to remodel those trusts by agreeing on behalf of infants and unborn persons to any rearrangement which it deems to be advantageous to them. These two lines are happily united in the proposition of the Lord Justice which I quote¹: "He [that is, Lord Hardwicke] "proceeded on the broad principle that the court had power to "deal with the property and interests of infants, or other persons "under disability, in a manner not authorized by the trust when- "ever the court was satisfied that what was proposed was most "advantageous for them provided, of course, that everyone of "full age agreed to it. I hope to show that that is the true "principle today."

It was natural that the Lord Justice should, upon the basis of an unlimited inherent jurisdiction, proceed to the conclusion that, whenever the court had in the past asserted a want of jurisdiction, it had of its own motion placed limitations on its own jurisdiction and, giving as examples of this abnegation its declared inability to remove a married woman's restraint on anticipation, to permit a sale of heirlooms or to sanction an unauthorized transaction for the sake of expediency, should observe that in all these cases the intervention of the legislature to vest these powers in the court must not be read as delimiting

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¹ [1953] Ch. 218, 269; [1953] 1 All E.R. 103.

H. L. (E.) the jurisdiction of the court, but rather as removing limitations which the court had imposed on itself. These statutory provisions
 1954 he said ² " show that the judges of the late nineteenth century
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 v. " ought not to make the same mistake today."

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My Lords, I am unable to accept as accurate this view of the origin, development and scope of the jurisdiction of the Court of Chancery. I do not propose to embark on the arduous task of tracing to its sources this peculiar jurisdiction. Many volumes have been devoted to it, and I have refreshed my memory by reference to some of them. Nowhere can I find any statement which would support the broad proposition for which the appellants contend. Moreover, the law reports contain many cases in which the scope of the jurisdiction has been discussed, every one of them a work of supererogation if its scope was unlimited.

In my opinion, the true view that emerges from a consideration of this jurisdiction through the centuries is not that at some unknown date it appeared full-fledged and that from time to time timid judges have pulled out some of its feathers, but rather that it has been a creature of gradual growth, though with many setbacks, and that the range of its authority can only be determined by seeing what jurisdiction the great equity judges of the past assumed and how they justified that assumption. It is, in effect, in this way that the majority of the Court of Appeal in the present case have approached the problem and, in my opinion, it is the right way. It may well be that the result is not logical, and it may be asked why, if the jurisdiction of the court extended to this thing, it did not extend to that also. But, my Lords, that question is as vain in the sphere of jurisdiction as it is in the sphere of substantive law. We are as little justified in saying that a court has a certain jurisdiction, merely because we think it ought to have it, as we should be in declaring that the substantive law is something different from what it has always been declared to be, merely because we think it ought to be so. It is even possible that we are not wiser than our ancestors. It is for the legislature, which does not rest under that disability, to determine whether there should be a change in the law and what that change should be.

My Lords, I have indicated what is, in my view, the proper approach to the problem and do not propose to traverse the ground which has been so ably covered by the majority of the

² [1953] Ch. 218, 276.

Court of Appeal and will be explored again by my noble and learned friends. The major proposition I state in the words of one of the great masters of equity. "I decline," said Farwell J. in *In re Walker*,³ "to accept any suggestion that the court has "an inherent jurisdiction to alter a man's will because it thinks it beneficial. It seems to me that is quite impossible." It should then be asked what are the exceptions to this rule. They seem to me to be reasonably clearly defined. There is no doubt that the Chancellor (whether by virtue of the paternal power or in the execution of a trust, it matters not) had and exercised the jurisdiction to change the nature of an infant's property from real to personal estate and vice versa, though this jurisdiction was generally so exercised as to preserve the rights of testamentary disposition and of succession. Equally, there is no doubt that from an early date the court assumed the power, sometimes for that purpose ignoring the direction of a settlor,⁽¹⁾ to provide maintenance for an infant, and, rarely, for an adult, beneficiary. So, too, the court had power in the administration of trust property to direct that by way of salvage some transaction unauthorized by the trust instrument should be carried out. Nothing is more significant than the repeated assertions by the court that mere expediency was not enough to found the jurisdiction. Lastly, and I can find no other than these four categories, the court had power to sanction a compromise by an infant in a suit to which that infant was a party by next friend or guardian ad litem. This jurisdiction, it may be noted, is exercisable alike in the Queen's Bench Division and the Chancery Division and whether or not the court is in course of executing a trust.

This brings me to the question which alone presents any difficulty in this case. It is whether this fourth category, which I may call the compromise category, should be extended to cover cases in which there is no real dispute as to rights and, therefore, no compromise, but it is sought by way of bargain between the beneficiaries to rearrange the beneficial interests under the trust instrument and to bind infants and unborn persons to the bargain by order of the court.

My Lords, I find myself faced at once with a difficulty which I do not see my way to overcome. For though I am not as a rule impressed by an argument about the difficulty of drawing the line since I remember the answer of a great judge that, though he knew not when day ended and night began, he knew that

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midday was day and midnight was night, yet in the present case it appears to me that to accept this extension in any degree is to concede exactly what has been denied. It is the function of the court to execute a trust, to see that the trustees do their duty and to protect them if they do it, to direct them if they are in doubt and, if they do wrong, to penalize them. It is not the function of the court to alter a trust because alteration is thought to be advantageous to an infant beneficiary. It was, I thought, significant that counsel was driven to the admission that since the benefit of the infant was the test, the court had the power, though in its discretion it might not use it, to override the wishes of a living and expostulating settlor, if it assumed to know better than he what was beneficial for the infant. This would appear to me a strange way for a court of conscience to execute a trust. If, then, the court has not, as I hold it has not, power to alter or rearrange the trusts of a trust instrument, except within the limits which I have defined, I am unable to see how that jurisdiction can be conferred by pleading that the alteration is but a little one.

It remains to say a few words on the authorities. Counsel have not cited, and I have not found, any case before the twentieth century in which the court has given to the term "compromise" a meaning which it does not legitimately bear and sanctioned an alteration of trusts where no dispute existed. Two cases were brought to your Lordships' notice which occurred in the early years of this century. One of them, *In re Wells*,⁴ a decision of Farwell J., does not, I think, upon examination support the extension of the jurisdiction. I will not anticipate what my noble and learned friend has to say about it. I cannot think that it weighs heavily in the scales against the emphatic views expressed by the same learned judge. The other case, *In re Trenchard*,⁵ a decision of Buckley J., is more difficult to explain. I should myself regard it as an isolated case in which the court went further than it had hitherto done in giving to the word "compromise" an unnatural meaning and to itself a jurisdiction never before exercised. After these two cases, there appears to have been no case in which the limits of the jurisdiction have been discussed until the present case and two others with it, which are not the subject of appeal, came before the court. But it seems that judges of the Chancery Division have in recent

⁴ [1903] 1 Ch. 848.⁵ [1902] 1 Ch. 378.

years entertained jurisdiction to make orders in chambers sanctioning on behalf of infant beneficiaries bargains or arrangements which involved the alteration of trusts but did not arise out of any dispute as to rights which it was expedient to compromise; just such orders, in fact, as that which is under consideration today. In the reported cases, *In re Duke of Leeds* ⁶ in 1947 and *In re Lucas* ⁷ in the same year, there is a clear indication of its being done and counsel assured us that it was done. But neither in these cases nor in other unreported cases in which a similar course was adopted does there appear to have been any argument. It is, moreover, clear from the orders made by Harman J. in the present case and by Roxburgh J. in the related cases of *In re Downshire Settled Estates* (sub nom. *In re D.'s Settled Estates* ⁸), and *In re Blackwell's Settlement Trusts* (sub nom. *In re B.'s Settlement* ⁹) that there was in the year 1952 no generally accepted doctrine on the question. Nor, though I am told that I myself made such an order when I was a judge of the High Court, would I assent of my own recollection to, the view that this jurisdiction was at any time during my life at the Bar or on the Bench generally regarded as belonging to the court. But this sort of recollection is necessarily fallible, and I would rather say that there is nothing in the reported cases of the last fifty years to show that there is now vested in the court a jurisdiction which it had formerly disclaimed.

This appeal must accordingly, in my view, be dismissed. Your Lordships will think it proper that the costs of the appellants and respondents should be paid out of the trust funds.

I cannot, my Lords, conclude without expressing to Mr. Buckley the gratitude of the House for the very able argument which as *amicus curiae* he addressed to us.

LORD OAKSEY. My Lords, my experience in the exercise of its jurisdiction by the Court of Chancery in the administration of trusts is so limited that I am not prepared to differ from the opinion about to be expressed by my noble and learned friend, Lord Morton of Henryton. I must confess, however, that I only agree with the greatest hesitation.

The general rule is said to be that the court must see that the trusts are executed, but it is conceded that the court has

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⁶ [1947] Ch. 525; 63 T.L.R. 547; [1947] 2 All E.R. 200.

⁷ [1947] Ch. 558; 63 T.L.R. 552; [1947] 2 All E.R. 213n.

⁸ [1952] 2 T.L.R. 483; [1952] 2 All E.R. 603; [1952] W.N. 428.

⁹ [1952] 2 T.L.R. 489; [1952] 2 All E.R. 647; [1952] W.N. 429.

H. L. (E.) no power to insist upon the execution of the trusts if the cancellation of the settlement is desired by all the parties if they are sui juris and the property can then be resettled upon altered trusts. Yet where infants are concerned the court cannot, it appears, sanction any alteration of the trusts under the general rule although the interests of the infants appear to demand the alteration. — *expressly not in Downshire's case.*

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LORD MORTON OF HENRYTON. My Lords, the case which is the subject of the present appeal is one of three cases which came before judges of the Chancery Division at the end of July in the year 1952. The other two are *In re Downshire Settled Estates* (sub nom. *In re D.'s Settled Estates*¹⁰) and *In re Blackwell's Settlement Trusts* (sub nom. *In re B.'s Settlement*¹¹). These three cases differed to some extent in their facts, but in each of them the court was asked to alter the trusts of a settlement, and in each of them the reason for the application was the same. The trustees and the adult beneficiaries realized that if the trusts of the settlement remained unaltered, the burden of taxation would be very heavy, whereas if the trusts were altered in certain respects that burden would or might be greatly reduced. They therefore applied to the court for an order sanctioning a scheme carrying out these alterations, on the ground that the adult parties approved the scheme and that it was for the benefit of the infant beneficiaries and of any after-born beneficiaries.

The present case, *In re Chapman's Settlement Trusts*, came before Harman J. in chambers on July 28, 1952, and he dismissed the application. The judge did not deliver a formal judgment, but it is agreed that he took the view that he had no jurisdiction to make the order which was sought.

On the same day Roxburgh J. had to consider the case of *In re Downshire Settled Estates*.¹² In that case the court was asked to sanction the scheme either under its general jurisdiction or under section 64 (1) of the Settled Land Act, 1925. Argument was heard in chambers, but judgment was delivered in open court on July 30. The judge reviewed certain authorities and concluded as follows¹³: "I hold that the transactions "involved in this scheme amount in substance to a rewriting of "the trusts, or a substantial part thereof, or to directions to "administer the trust property on the footing that new trusts

¹⁰ [1952] 2 T.L.R. 483.

¹² Ibid. 483.

¹¹ Ibid. 489.

¹³ Ibid. 488.

“ have been declared and old trusts have been struck out or varied, and the admitted purpose of the scheme is not to solve any administrative problem but to rearrange beneficial interests to greater advantage. Such proposals fall, in my judgment, outside the scope of the court’s ‘extraordinary’ jurisdiction.” He held also that the proposals were outside the ambit of section 64 of the Settled Land Act, 1925, and section 57 of the Trustee Act, 1925.

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Next day, Roxburgh J. gave judgment in open court in *In re Blackwell’s Settlement Trusts*,¹⁴ which had also been argued in chambers. In that case the settlement was of personalty, and the general jurisdiction and section 57 of the Trustee Act, 1925, were relied upon. The judge said¹⁵: “This scheme, in my judgment, proposes a much less drastic re-settlement than the scheme in *In re D.’s Settled Estates*,¹⁶ but my conclusions are ‘the same.’”

The applicants appealed in all three cases, and as in none of the cases was there any person or class of persons concerned to argue against the applicants’ contentions, the Court of Appeal thought it proper to suggest that counsel should be instructed on behalf of the Attorney-General to assist the court as *amicus curiae*. Mr. Buckley appeared in response to that suggestion, both in the Court of Appeal and in this House, and has rendered very valuable assistance.

The Court of Appeal allowed the appeals in *In re Downshire Settled Estates*¹⁷ and *In re Blackwell’s Settlement Trusts*,¹⁷ but by a majority (Evershed M.R. and Romer L.J.) they dismissed the appeal in *In re Chapman’s Settlement Trusts*.¹⁷ Denning L.J. would have allowed the appeal in all three cases. The present appeal relates only to the case of *In re Chapman’s Settlement Trusts*,¹⁷ but I have found it convenient to state the history of all three cases, for reasons which will appear later.

[His Lordship stated the facts and continued:] To the above statement of the facts (which is taken in substance from the majority judgment in the Court of Appeal) I would add that in this House counsel asked for an order in somewhat different terms, the effect being that the trusts declared by clause 3 of the 1944 settlement and clause 4 of the 1950 settlement should no longer have any operation.

My Lords, the first question which arises is solely one of jurisdiction, and may be stated thus: Had Harman J. jurisdiction

¹⁴ [1952] 2 T.L.R. 489.¹⁶ *Ibid.* 483.¹⁵ *Ibid.* 490.¹⁷ [1953] Ch. 218.

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to destroy the trusts contained in clause 3 of the 1944 settlement and the similar trusts created by clause 4 of the 1950 settlement, if (a) all adult beneficiaries assented and (b) he came to the conclusion that the elimination of these trusts would result in benefit to the infant beneficiaries and to any after-born beneficiaries? For the sake of brevity I shall address my observations only to the case of the 1944 settlement, since precisely similar considerations will apply to the 1950 settlement.

It is common ground that the discretionary trusts contained in clause 3 of the 1944 settlement are in no way objectionable in themselves, but I shall assume, for the purposes of this judgment, that their elimination would be beneficial to all parties concerned, by reason of the relevant taxing provisions.

Mr. Neville Gray for the appellant trustees and Mr. Russell for the respondents, three of whom are infants, invite your Lordships to answer the question already posed in the affirmative. Mr. Buckley, as *amicus curiae*, has put forward, for the assistance of this House, certain reasons why it should be answered in the negative. Mr. Gray first contended that the Court of Chancery, and its successor the Chancery Division of the High Court of Justice, has had for many years an inherent jurisdiction to make such an order as is sought in the present case. The same argument was advanced in the Court of Appeal and was stated in the majority judgment as follows¹⁸: "It was the argument of "counsel for all the appellants (founded on Lord Jeffreys L.C.'s "case, *Earl of Winchelsea v. Norcliffe*,¹⁹ and other early cases, "including *Pierson v. Shore*,²⁰ before Lord Hardwicke L.C. and "*Inwood v. Twyne*,²¹ before Lord Northington L.C.), that the "jurisdiction of the court to modify or vary trusts and to direct "the trustees accordingly was unlimited provided: (1) that all "persons interested who were *sui juris* assented, and (2) that it "was clearly shown to be for the advantage or convenience of all "persons interested who were not *sui juris*, including persons "unborn or not presently ascertainable; in other words, that the "court has unlimited jurisdiction in relation to the property of "infants, including the beneficial interests of infants and unborn "cestuis que trustent under a settlement, and will exercise that "jurisdiction so as to secure any benefit or advantage for the "infants or unborn persons, which they could have themselves "secured had they been in *esse* and *sui juris*, even to the extent

¹⁸ [1953] Ch. 233.

¹⁹ (1687) 1 Vern. 435.

²⁰ (1739) 1 Atk. 480.

²¹ (1762) Amb. 417.

"of sanctioning a departure from the beneficial trusts of the trust instrument from which the interests in question are derived." H. L. (E.) 1954

The majority rejected this argument, but Denning L.J. accepted it. My Lords, on this point I find myself in complete agreement with the majority. They expressed their conclusion in the following language, which I would desire to adopt as my own ²²: "In our judgment, such a broad and general jurisdiction "is inconsistent with the two decisions of this court in 1901 and "1903, never, so far as we are aware, subsequently qualified or "criticized, namely, *In re New* ²³ and *In re Tollemache* ²⁴ . . . "The general rule . . . is that the court will give effect, as it "requires the trustees themselves to do, to the intentions of a "settlor as expressed in the trust instrument, and has not "arrogated to itself any overriding power to disregard or re-write "the trusts (see, for example, *D'Eyncourt v. Gregory*, ²⁵ *Johnstone v. Baber* ²⁶). There have been cases in which the court "has made orders which did undoubtedly result in a departure "from the trusts declared by the settlor; in our opinion, however, "these cases did not establish new rules but only exceptions to "the general rule."

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Mr. Gray contended that the cases which the Court of Appeal regarded as exceptions were really examples of the unlimited jurisdiction which he sought to establish. I call it "unlimited jurisdiction," because Mr. Gray set no limit to it, provided only that the two elements already mentioned are present. It is necessary, therefore, to examine these so-called examples in some detail. Mr. Gray grouped them under four heads—(a) cases in which the court has effected changes in the nature of an infant's property, e.g., by directing investment of his personalty in the purchase of freeholds; (b) cases in which the court has allowed the trustees of settled property to enter into some business transaction which was not authorized by the settlement; (c) cases in which the court has allowed maintenance out of income which the settlor or testator directed to be accumulated; (d) cases in which the court has approved a compromise on behalf of infants and possible after-born beneficiaries.

As to head (a). In my view these cases in no way assist the argument now under consideration. It is self-evident that a change in the nature of property to which an infant is absolutely entitled causes no change in the infant's beneficial interest, and

²² [1953] Ch. 218, 233-4.

²³ [1901] 2 Ch. 534.

²⁴ [1903] 1 Ch. 457, 955.

²⁵ (1876) 3 Ch.D. 635.

²⁶ (1845) 8 Beav. 233.

H. L. (E.) it is noteworthy that even in such cases the court usually so framed its order that the infant's right to make a will during infancy in the case of personalty, and the rights of his heir to take the realty if the infant died under the age of 21, were carefully safeguarded. Some earlier instances of this exercise of the court's paternal jurisdiction are *Earl of Winchelsea v. Norcliffe*,²⁷ *Pierson v. Shore*,²⁸ *Bridges v. Bridges*,²⁹ *Inwood v. Twyne*,³⁰ *Ashburton (Lord) v. Ashburton (Lady)*.³¹ Even this limited jurisdiction was recognized as being of an exceptional nature in *In re Jackson*³²; see also *Glover v. Barlow*.³³ A similar jurisdiction was exercised in the case of lunatics.

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As to head (b). The leading case under this head is *In re New*.³⁴ In that case the Court of Appeal authorized the trustees of three separate trust instruments to concur in a shareholders' scheme for the reconstruction of a prosperous limited company, shares in which, settled by the settlor or testator in each case, had become vested in the trustees, it being proposed that all the shareholders in the existing company should exchange their shares, all of which were fully paid, for more realizable shares (fully paid) and debentures in the proposed new or reconstructed company. The evidence showed that the scheme would be greatly to the advantage of all parties interested under the several trusts, including infants and unborn persons. In one of the three cases the trustees had power, under the trust instrument, to invest in shares or debentures of such a company as the proposed new company. In the two other cases, as the trustees had no such power, the court put them on an undertaking to apply for leave to retain the shares and debentures they would obtain under the scheme, if they desired to retain them beyond one year from the time the reconstruction should be carried into effect.

Romer L.J. in delivering the judgment of the court said³⁵:
"As a rule, the court has no jurisdiction to give, and will not
"give, its sanction to the performance by trustees of acts with
"reference to the trust estate which are not, on the face of the
"instrument creating the trust, authorized by its terms. The
"cases of *In re Crawshay*,³⁶ decided by North J., and *In re Morrison*,³⁷ decided by Buckley J., are instances where the

²⁷ 1 Vern. 435.

²⁸ 1 Atk. 480.

²⁹ (1752) 12 App.Cas. 693n.

³⁰ Amb. 417.

³¹ (1801) 6 Ves. 6.

³² (1882) 21 Ch.D. 786.

³³ (1831) 21 Ch.D. 788n.

³⁴ [1901] 2 Ch. 534.

³⁵ Ibid. 544.

³⁶ [1888] W.N. 246; 60 L.T. 357.

³⁷ [1901] 1 Ch. 701; 17 T.L.R. 330.

“ court was asked to sanction steps to be taken by trustees which
 “ it thought unjustifiable, and which it declared it had no juris-
 “ diction to authorize. But in the management of a trust estate,
 “ and especially where that estate consists of a business or shares
 “ in a mercantile company, it not infrequently happens that some
 “ peculiar state of circumstances arises for which provision is not
 “ expressly made by the trust instrument, and which renders it
 “ most desirable, and it may be even essential, for the benefit
 “ of the estate and in the interest of all the cestuis que trust,
 “ that certain acts should be done by the trustees which in
 “ ordinary circumstances they would have no power to do. In a
 “ case of this kind, which may reasonably be supposed to be one
 “ not foreseen or anticipated by the author of the trust, where the
 “ trustees are embarrassed by the emergency that has arisen and
 “ the duty cast upon them to do what is best for the estate, and
 “ the consent of all the beneficiaries cannot be obtained by reason
 “ of some of them not being sui juris or in existence, then it may
 “ be right for the court, and the court in a proper case would have
 “ jurisdiction, to sanction on behalf of all concerned such acts
 “ on behalf of the trustees as we have above referred to. By way
 “ merely of illustration, we may take the case where a testator
 “ has declared that some property of his shall be sold at a
 “ particular time after his death, and then, owing to unforeseen
 “ change of circumstances since the testator’s death, when the
 “ time for sale arrives it is found that to sell at that precise time
 “ would be ruinous to the estate, and that it is necessary or right
 “ to postpone the sale for a short time in order to effect a proper
 “ sale: in such a case the court would have jurisdiction to
 “ authorize, and would authorize, the trustees to postpone the
 “ sale for a reasonable time.

“ It is a matter of common knowledge that the jurisdiction we
 “ have been referring to, which is only part of the general adminis-
 “ trative jurisdiction of the court, has been constantly exercised,
 “ chiefly at chambers. Of course, the jurisdiction is one to be
 “ exercised with great caution, and the court will take care not to
 “ strain its powers. It is impossible, and no attempt ought to
 “ be made, to state or define all the circumstances under which,
 “ or the extent to which, the court will exercise the jurisdiction;
 “ but it need scarcely be said that the court will not be justified
 “ in sanctioning every act desired by trustees and beneficiaries
 “ merely because it may appear beneficial to the estate; and
 “ certainly the court will not be disposed to sanction transactions
 “ of a speculative or risky character. But each case brought

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1954 "its special circumstances."

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My Lords, surely the passage just quoted tells strongly against the argument now under consideration. The opening sentence states the general rule in the plainest terms and clearly recognizes that even the limited and exceptional jurisdiction to sanction transactions in the nature of "salvage" of the trust property must be exercised with great caution. The court was, of course, only dealing with a proposed investment to be made by trustees, and the beneficial trusts were in no way altered; but surely if the court had had the wide general power to alter trusts, for which counsel contend, the whole trend of the judgment would have been different.

Two years later Kekewich J. and the Court of Appeal had to consider the case of *In re Tollemache*.³⁸ In that case the trustees sought power to acquire a mortgage of the interests of the tenant for life. This transaction was not within the investments authorized by the settlement, but it was pointed out that it would increase the income of the tenant for life and would not injure the remaindermen. Kekewich J. refused the application and carefully analysed the relevant authorities as to jurisdiction, including *In re New*.³⁹ After citing certain cases, he observed⁴⁰: "The
"above are illustrations of the exercise by the court, justified by
"the practical necessity of the case, of jurisdiction going beyond
"the mere administration of trusts according to the terms of the
"instruments creating them. Others might be given, the appli-
"cations or rather the circumstances inducing them exhibiting
"large varieties, but those mentioned suffice to explain the scope
"of the practice of the court. There might be added illustrations
"of the refusal of the court to exercise this extraordinary juris-
"diction, but there is no occasion. All the cases of refusal may
"be grouped under one of two classes. Either, notwithstand-
"ing the advantage actual and prospective of what is proposed
"to be done, there is no urgency for it, and the existing state of
"things may without great mischief be allowed to remain, or the
"terms on which the advantage can be gained are such that
"the court would by accepting them create a new trust in lieu of
"that which it is administering."

The judgments of the Court of Appeal are as follows⁴¹:
Vaughan Williams L.J.: "It is admitted that the applicant

³⁸ [1903] 1 Ch. 457, 955.

³⁹ [1901] 2 Ch. 534.

⁴⁰ [1903] 1 Ch. 457, 462.

⁴¹ [1903] 1 Ch. 955, 956.

"cannot succeed unless she can bring herself within *In re New*.⁴²
 "Putting that case shortly, it is this—that a case may arise in
 "which, in the course of the administration of an estate, such an
 "emergency may occur that it must be dealt with at once; but
 "it cannot be said that there is any such emergency here. The
 "appeal must, therefore, be dismissed, and with costs." Romer
 L.J.: "I agree. *In re New*⁴² shows how far the court will go,
 "and beyond what point it will not go." Cozens-Hardy L.J.:
 "I agree. I will only add that, in my opinion, *In re New*⁴²
 "constitutes the high-water mark of the exercise by the court of
 "its extraordinary jurisdiction in relation to trusts."

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To quote again the majority judgment in the present case⁴³:
 "Those judgments are, in our view, consistent, and only con-
 "sistent, with the conclusion we have expressed above, and are
 "irreconcilable with the broad general proposition for which
 "counsel for the appellants have contended. It is to be noted
 "that Romer L.J., who had delivered the judgment in *In re*
New,⁴⁴ was a member of the court in *In re Tollemache*.⁴⁵ In
 "view of the arguments now put forward, the present members
 "of the Court of Appeal wish that he had more precisely stated
 "the limits of the jurisdiction which he plainly had in mind;
 "he indicated no dissent from, or qualification of, the other
 "judgments of the court or the judgment of Kekewich J."

My Lords, in my view the cases just mentioned, exemplifying
 the exceptional jurisdiction which is exercised for the sake of
 "salvage" of the trust property, far from supporting the exist-
 ence of a general jurisdiction in the court to alter trusts, go far
 to negative it.

As to head (c). It is said, and said truly, that in some cases
 under this head the court's order resulted in an alteration of
 beneficial interests, since income was applied in maintaining
 beneficiaries, notwithstanding that the testator or settlor had
 directed that it should be accumulated or applied in reduction of
 incumbrances. Some instances are *Revel v. Watkinson*,⁴⁶
Cavendish v. Mercer,⁴⁷ *Greenwell v. Greenwell*,⁴⁸ *Errat v.*
Barlow,⁴⁹ *Haley v. Bannister*,⁵⁰ *Havelock v. Havelock*.⁵¹ This
 jurisdiction is too well established to be doubted today. It was
 explained as follows by Pearson J. in *In re Collins*⁵²: "The

⁴² [1901] 2 Ch. 534.⁴³ [1953] Ch. 218, 238.⁴⁴ [1901] 2 Ch. 534.⁴⁵ [1903] 1 Ch. 955.⁴⁶ (1748) 1 Ves. Sen. 93.⁴⁷ (1776) 5 Ves. 195n.⁴⁸ (1800) 5 Ves. 194.⁴⁹ (1807) 14 Ves. 202.⁵⁰ (1819) 4 Madd. 275.⁵¹ (1881) 17 Ch.D. 807.⁵² (1886) 32 Ch.D. 229, 232.

H. L. (E.) “ground of the decision”—that is, the decision in *Havelock v. Havelock* ⁵³—“I take to be, that where a testator has made a provision for a family, using that word in the ordinary sense in which we take the word, that is, the children of a particular stirps in succession or otherwise, but has postponed the enjoyment, either for a particular purpose or generally for the increase of the estate, it is assumed that he did not intend that these children should be left unprovided for or in a state of such moderate means that they should not be educated properly for the position and fortune which he designs them to have, and the court has accordingly found from the earliest time that where an heir-at-law is unprovided for, maintenance ought to be provided for him.”

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A somewhat similar explanation was given by Farwell J. in *In re Walker*.⁵⁴ It is clear that neither of these judges regarded the maintenance cases as affording any evidence that the court had an inherent jurisdiction to alter beneficial trusts in any way it pleased. To my mind they must be regarded as an exception, and I think the only real exception, to the general rule, as stated by Romer L.J. in *In re New* ⁵⁵ in the words already quoted and by Farwell J. in *In re Walker* ⁵⁶ when he said: “I decline to accept any suggestion that the court has an inherent jurisdiction. to alter a man’s will because it thinks it beneficial. It seems to me that is quite impossible.”

Striking instances of cases which negative the existence of the alleged, unlimited jurisdiction are *In re Crawshay*,⁵⁷ *In re Morrison* ⁵⁸ (Buckley J.) and *In re Montagu* ⁵⁹ (Court of Appeal). In the first of these cases North J. said ⁶⁰: “I should not be administering the trusts created by the testator if I consented to this scheme. I should be altering his trusts and substituting something quite outside the will. On the assumption that the scheme would be beneficial to the estate, I cannot decide that I have jurisdiction to authorize it.” In the last-mentioned case the Court of Appeal held that it had no jurisdiction to allow the trustees of a settlement to raise money by mortgage of the settled estate and to apply it in pulling down and rebuilding some of the houses on the property. Lindley L.J. said ⁶¹: “We none of us see our way to hold that there is jurisdiction to make

⁵³ 17 Ch.D. 807.⁵⁴ [1901] 1 Ch. 879, 885.⁵⁵ [1901] 2 Ch. 534.⁵⁶ [1901] 1 Ch. 879, 885.⁵⁷ 60 L.T. 357.⁵⁸ [1901] 1 Ch. 701.⁵⁹ [1897] 2 Ch. 8.⁶⁰ 60 L.T. 357, 359.⁶¹ [1897] 2 Ch. 8, 10.

“ an order in this case. It is very desirable that the court
 “ should have jurisdiction to deal with such a case; but Parlia-
 “ ment has never gone so far as to give it that jurisdiction. No
 “ doubt it would be a judicious thing to do what is wanted in this
 “ case, and if the persons interested were all ascertained and of
 “ age, they would probably concur, and then it might be done;
 “ but they are not all ascertained nor of full age; and unless the
 “ court can authorize the trustees to do it, it cannot be done.”
 Lopes L.J. said ⁶²: “ I have no doubt that what is proposed
 “ is beneficial, and would increase both the income and the
 “ capital value of the property. The question is whether the court
 “ has jurisdiction to sanction it. There is no provision in the
 “ settlement which would authorize the works in question, nor
 “ do they fall within any of the improvements sanctioned by the
 “ Settled Land Acts. It is urged that the court, having control
 “ over trust property, can sanction them, as it would be vastly
 “ for the benefit of the persons interested that it should do so.
 “ That is not enough. If the buildings were falling down it
 “ would be a case of actual salvage and would stand differently.
 “ Even in cases of repairs the court has been very careful in the
 “ exercise of its jurisdiction. In the case of *In re Jackson*,⁶³
 “ Kay J., in dealing with a case of repairs, said: ‘ I think that
 “ ‘ this jurisdiction should be jealously exercised, and only in
 “ ‘ cases which amount to actual salvage.’ The present cannot
 “ be said to be a case of actual salvage, and the learned judge
 “ was right in refusing to exercise a jurisdiction which he in fact
 “ did not possess.”

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As to head (d). There are, of course, many cases to be found in the reports in which the Court of Chancery, and its successor the Chancery Division, have approved compromises of disputed rights on behalf of infants interested under a will or settlement and on behalf also of possible after-born beneficiaries. In my opinion these cases in no way support the existence of the “ unlimited jurisdiction ” for which Mr. Gray contends. Where rights are in dispute, and the court approves a compromise, it is not altering the trusts, for the trusts are, *ex hypothesi*, still in doubt and unascertained.

For these reasons, I would reject Mr. Gray’s contention that the court has the unlimited jurisdiction already described. It now becomes necessary to examine a further argument, of far-reaching importance, which was fully developed by Mr. Russell.

⁶² [1897] 2 Ch. 11.⁶³ (1882) 21 Ch.D. 786, 789.

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This argument may be summarized as follows: "Let it be assumed, for the purposes of this argument, that the Court of Appeal rightly rejected our submission as to the general jurisdiction of the Court of Chancery, and its successor the Chancery Division, to modify or vary trusts. Even on that assumption the present scheme can be sanctioned as being a 'compromise.' There is no doubt that in cases where the respective rights of persons interested under a will or settlement were in dispute, the Court of Chancery down to 1873, and the Chancery Division since the passing of the Judicature Act, has had jurisdiction to approve a compromise on behalf of infants and unborn persons. There has never been any logical reason why this jurisdiction should not extend to alterations of beneficial interests under a trust, if such alterations are desired by the adult beneficiaries and are for the benefit of infants and any after-born beneficiaries, and it has been so extended on various occasions during the last fifty years. Arrangements of this kind may not be compromises in the strict sense, if no rights are in dispute, but they are compromises 'in the broader sense of the word'—to quote the majority judgment in the Court of Appeal. The majority had no good reason for rejecting the arrangement in *In re Chapman's Settlement Trusts*⁶⁴ if they had jurisdiction to sanction the arrangements in *In re Downshire Settled Estates*⁶⁴ and *In re Blackwell's Settlement Trusts*.⁶⁴ No one of them is a compromise of disputed rights; each one results in an alteration or rearrangement of beneficial interests under a settlement, and each one is made for the same reason—the desire to reduce or avoid taxation."

As this argument is based partly on the reasoning of the Master of the Rolls and Romer L.J. in their joint judgment, and partly upon the fact that the Court of Appeal was unanimous in sanctioning the schemes put forward in *Downshire*⁶⁴ and *Blackwell*,⁶⁴ it is necessary to set out in some detail the course taken in the joint judgment. After rejecting the argument as to the "unlimited jurisdiction," and referring to the maintenance cases as an exception to the rule that the court cannot alter or vary trusts, the joint judgment proceeded as follows⁶⁵: "It must also now be taken in our judgment (at any rate since the decision of *In re Trenchard*⁶⁶ fifty years ago) that the court 'has a further power and jurisdiction . . . to approve, on behalf

⁶⁴ [1953] Ch. 218.⁶⁶ [1902] 1 Ch. 378.⁶⁵ *Ibid.* 239.

“ of persons interested under the trust who are under a disability
 “ (particularly infants) and persons who may hereafter become
 “ interested, compromises proposed by or between persons bene-
 “ ficially interested under the trust who are sui juris, and to
 “ direct and protect trustees accordingly; and the word ‘ com-
 “ ‘ promise ’ should not be narrowly construed so as to be
 “ ‘ confined to ‘ compromises ’ of disputed rights.” It is to be
 noted that it is not stated at this point how far the word
 “ ‘ compromise ’ is to extend.

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The Master of the Rolls and Romer L.J. went on to consider
*In re Trenchard*⁶⁶ and *In re Wells*.⁶⁷ I shall consider these
 cases later. They then turned to a consideration of section 57
 of the Trustee Act, 1925. They thought that that section afforded
 the appellants no assistance, and in this House counsel have
 stated that they could not contend that that section had any
 application to the present case. After making some observations
 on section 64 of the Settled Land Act, 1925, the majority then
 considered the case of *In re Downshire Settled Estates*⁶⁸ and
 said⁶⁹: “ In our judgment, the present scheme does fall fairly
 “ within the ambit of the court’s jurisdiction to approve com-
 “ promises (used in the broad sense of the word) which is
 “ illustrated in Buckley J.’s decision in *In re Trenchard*.”⁷⁰
 Later they observed⁷¹: “ . . . we think that . . . the proposals
 “ may fairly and properly be regarded as constituting a com-
 “ promise in the broader sense of the word in which it was used
 “ in *In re Trenchard*.”⁷² They then turned to the case now under
 appeal, and expressed their views in language which must be
 quoted in full⁷³:

“ The only possible way, therefore, as it seems to us, that
 “ the scheme could be brought within the inherent jurisdiction
 “ of the court is by showing that it involves a compromise or
 “ composition of beneficial interests to which the principle
 “ exemplified in *In re Trenchard*⁷⁴ can properly be applied. We
 “ are unable, however, to see how any such compromise or com-
 “ position arises. Certainly there is no question of compromise
 “ in the strict sense, for none of the relevant beneficial interests
 “ gives rise to any question of construction or is otherwise in
 “ dispute. It is suggested, however, that something in the nature
 “ of a composition of the rights of Mr. Macgowan Chapman’s

⁶⁶ [1902] 1 Ch. 378.⁶⁷ [1903] 1 Ch. 848.⁶⁸ [1953] Ch. 218.⁶⁹ *Ibid.* 258.⁷⁰ [1902] 1 Ch. 378.⁷¹ [1953] Ch. 218, 258-9.⁷² [1902] 1 Ch. 378.⁷³ [1953] Ch. 218, 265.⁷⁴ [1902] 1 Ch. 378.

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“ children is to be found in the elimination, during the lifetime
 “ of the settlors,”—(the last six words should, I think, read
 “ during the period stated in the settlements ”)—“ of the expecta-
 “ tion that each may have of receiving more, or less, than the
 “ others, and in substituting equal rights among the class, as
 “ between themselves, in its place. We think that there are
 “ two objections to the acceptance of this view: first, although
 “ it is true that the scheme if sanctioned would have the result
 “ described, we cannot regard that result as constituting a com-
 “ position of rights in any real sense at all. It is nothing more
 “ than a rearrangement of beneficial interests which, to the
 “ extent that it might prove to be of advantage to some members
 “ of the class, would correspondingly operate to the prejudice of
 “ others. It cannot, therefore, be compared to a proposal under
 “ which, for example, the contingent interests of all of the
 “ members of a class in a fund are converted into vested interests
 “ in a smaller fund, for in such a case the proposal, if beneficial
 “ to one member of the class, would of necessity be beneficial to
 “ them all. Secondly, it is impossible to say, on the facts of the
 “ case, that the rights and interests of the children under the
 “ existing discretionary trusts are prejudicial to them and should
 “ therefore be eliminated. Both of the settlements were executed
 “ within the last 10 years and the trusts in question were pre-
 “ sumably inserted therein because the settlors thought that their
 “ introduction would be of advantage to the children; they may
 “ well have thought, for example, that some of the children might
 “ need more for maintenance than others and, accordingly, they
 “ empowered the trustees to provide for this if occasion should
 “ require. Nothing has since transpired to show that their views
 “ upon this matter were wrong. All that has transpired is that
 “ the manner in which the discretionary trusts were framed may
 “ attract an unexpected claim for death duties. The object of
 “ the scheme, accordingly, is not to compound the interests which
 “ the children have under the discretionary trust, but to avoid
 “ the claim for duties; and such avoidance does not, and cannot,
 “ be regarded as a composition of rights for the purpose of the
 “ second exception to the rule. Moreover, although, as we have
 “ previously said, the fact that a scheme will result in the saving
 “ of death duties or income tax is, in itself, no ground for its
 “ rejection, the acceptance of the scheme now under considera-
 “ tion might well be followed by the presentation of further pro-
 “ posals of a similar character whenever it should be considered
 “ desirable in the future to avoid or mitigate the effect of such

"changes as may occur hereafter in the existing fiscal legislation.
 "We would point out, therefore, that it is no part of the functions
 "of Her Majesty's courts to recast settlements from time to time,
 "merely with a view to tax avoidance even if they had the power
 "to do so which, in our opinion, they have not.

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"It follows from what we have said that the scheme proposed
 "is in truth what it appears on its face to be, namely, the destruc-
 "tion of trusts expressly declared, and that, inasmuch as it cannot
 "be brought within the first exception to the general rule and
 "cannot, under the guise of a composition, invoke the second
 "exception, the rule applies; and the court accordingly has no
 "jurisdiction to authorize the trustees to carry it into effect. This
 "appeal, in our judgment, must therefore fail."

To complete the picture, I add that the majority allowed the
 appeal in *In re Blackwell's Settlement Trusts*,⁷⁵ saying: "In our
 "judgment, therefore, the scheme is of a nature which it is
 "competent for the court to sanction in exercise of its jurisdiction
 "to approve compromises in the wide sense of that word which
 "we have already indicated."

My Lords, I have set out this lengthy survey of the majority
 judgment because I could devise no other satisfactory way of
 approaching the argument addressed to your Lordships by Mr.
 Russell, which I have already summarized.

This argument brings one face to face with the vitally
 important question—is it possible to draw a line at some point
 between the court's undoubted jurisdiction to sanction a com-
 promise of disputed rights, and the alleged unlimited jurisdiction
 to alter beneficial interests to any extent, provided that every
 person interested who is *sui juris* assents and the change is
 shown to be for the benefit of infants and after-born beneficiaries?
 I confess that I have found it impossible to draw such a line. As
 I have said, the court's jurisdiction to sanction a compromise in
 the true sense, when the beneficial interests are in dispute, is
 not a jurisdiction to alter these interests, for they are still un-
 ascertained. If, however, there is no doubt as to the beneficial
 interests, the court is, to my mind, exceeding its jurisdiction if it
 sanctions a scheme for their alteration, whether the scheme is
 called a "compromise in the broader sense" or an "arrange-
 "ment" or is given any other name. Mr. Russell in the course
 of his argument suggested that the step from the former to the
 latter class of case was a short one. My Lords, it may be a

⁷⁵ [1953] Ch. 218, 269.

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 1954 In my view that field was not open to the court at the beginning
 of the present century and is not open now. I think that Farwell J.
 CHAPMAN (as he then was) was right when in 1901 he used the words already
 v. quoted—"I decline to accept any suggestion that the court has
 CHAPMAN. "an inherent jurisdiction to alter a man's will because it thinks
 Lord Morton "it beneficial. It seems to me that is quite impossible": *In*
 of Henryton. *re Walker*.⁷⁶ If these words are true in the case of a will, they
 are equally true in the case of a settlement, and in 1952 Roxburgh
 and Harman JJ., in effect, adopted the words of Farwell J. and
 applied them to the present day. I think these two judges were
 right.

It follows that, in my view, the majority of the Court of Appeal were right in dismissing this appeal, but their decisions in *In re Downshire Settled Estates*⁷⁷ and *In re Blackwell's Settlement Trusts*⁷⁷ went too far. The facts in these two cases are fully set out in the majority judgment and need not be repeated here. Suffice it to say that the scheme in each case involved extensive alterations of the beneficial trusts declared in settlements dated respectively 1915 and 1933, in order to reduce taxation, including in each case the release of part of the settled property from a protected life interest. In neither case was there any appeal, but I have found it necessary to express my view upon them because counsel have cited these cases as authorities, and have submitted (rightly, as I think) that the present case cannot be distinguished from them.

I must, however, examine the cases which were said to establish the jurisdiction to sanction the scheme now before your Lordships.

The first such case is *In re Trenchard*,⁷⁸ and the facts must be stated somewhat fully, in view of the argument which has been based on this case. A testator who died in 1899 by clause 3 of his will gave to his wife "the use of my residence Woodville "aforesaid so long as she shall desire to make it her permanent "place of residence and shall remain my widow, my estate to "pay all rates, taxes, and outgoings in respect thereof, and to "keep the house and grounds in tenantable repair." The testator gave his residuary real and personal estate to his trustees upon the usual trusts for sale and conversion and payment of debts and legacies and directed them to stand possessed of his residuary trust moneys and the income thereof upon certain

⁷⁶ [1901] 1 Ch. 879, 885.

⁷⁸ [1902] 1 Ch. 378.

⁷⁷ [1953] Ch. 218.

trusts for his children and remoter issue. He directed his trustees to postpone the sale of his Honor Oak estate (which included Woodville House) until after the death or marriage again of his wife and he empowered them from time to time as they should think fit to develop the same estate, and for that purpose to use such part of his estate as they deemed advisable.

The widow took possession of Woodville and resided there, but finding that it was a larger house than she required and that there were difficulties connected with the management, repairs, outgoings and development of the property, she asked the trustees to come to an arrangement with her. Questions arose and, on a summons taken out by the trustees, Buckley J. made an order declaring that the widow had the powers of a tenant for life under the Settled Land Acts and that she would not forfeit the benefits conferred upon her by the directions in the will by selling or leasing the house under those powers. All the persons interested desired that the estate, which was freehold, should be developed for building purposes, but this could not be done so long as the widow remained in occupation of Woodville, and would be prevented if she sold Woodville in exercise of her powers as tenant for life under the Settled Land Acts. The widow estimated her interest in the rental value of Woodville, together with the rates, taxes and outgoings, at £350 a year and offered to release her claims under clause 3 of the will to the trustees in return for a fixed payment of £320 a year.

A summons was taken out to decide whether the trustees had power, with the sanction of the court, to enter into an arrangement by way of compromise for the payment to her of a fixed annual sum in satisfaction of her claims under clause 3 of the will, and if so, that an agreement to pay her a fixed sum of £275 per annum during widowhood by way of compromise of the whole of her claims under clause 3 of the will might be approved by the court. There were infants interested in residue and they appeared by counsel, who expressed the view that the compromise was beneficial to them. Buckley J. (as he then was) approved the arrangement, saying⁷⁹: "It seems to me " that this is a fair compromise for all parties, and I declare " that it is within the power of the trustees to enter into it, and " I sanction it accordingly."

My Lords, this decision appears to me to be no more than the sanctioning by the court of a purchase by the trustees of the

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widow's rights. It may be that Buckley J. stretched the jurisdiction to approve a compromise beyond its proper limits; but I cannot regard him as claiming a new and extensive jurisdiction, the existence whereof had so recently been denied by the judges of the Chancery Division and by the Court of Appeal.

The next case relied upon was *In re Wells*.⁸⁰ The facts of this case are very fully stated in the majority judgment of the Court of Appeal and need not be repeated here. I entirely accept the observations in the majority judgment on that case⁸¹:

"There was no rearrangement or altering of any trusts. All persons interested under the trusts of the testator's will, according to its terms, were sui juris and capable of determining the trusts. The difficulty arose solely from the fact that derivative settlements had been made by the persons contingently entitled to the corpus of the estate. No alteration was required of any of the trusts of these settlements. What was proposed was that the trustees of the derivative settlements should receive a present and certain subject-matter instead of their previously existing contingent rights."

In my view, *In re Wells*⁸² affords no support to the argument now under consideration. It was decided by Farwell J. (as he then was) and I feel sure that he did not think that in sanctioning the arrangement there proposed he was in any way departing from the views, already quoted, which he had expressed so forcibly in *In re Walker*.⁸³

So far as reported cases are concerned, there is a long gap between *In re Wells*⁸⁴ and *In re Duke of Leeds*.⁸⁵ Counsel assured us, however, that, during the intervening forty-four years, orders had been made from time to time in chambers which were similar in their effect to the orders asked for in the present case, in *In re Downshire Settled Estates*⁸⁶ and in *In re Blackwell's Settlement Trusts*.⁸⁶

My Lords, this may well have been so, but, accepting counsel's statement, I would make the following observations. First, when judges are exercising an undoubted jurisdiction in chambers, the manner in which they exercise it may form a useful precedent; but no judge can acquire a jurisdiction which he does not possess merely by making orders which extend beyond that jurisdiction. Secondly, it is impossible to found any

⁸⁰ [1903] 1 Ch. 848.⁸¹ [1953] Ch. 218, 243.⁸² [1903] 1 Ch. 848.⁸³ [1901] 1 Ch. 879.⁸⁴ [1903] 1 Ch. 848.⁸⁵ [1947] Ch. 525.⁸⁶ [1953] Ch. 218.

proposition upon an unreported case without being aware of all the facts, the precise nature of the order made, and the arguments advanced at the hearing. It may well be that the question of jurisdiction was never brought to the minds of the judges who dealt with these matters in chambers. I would add this—according to my recollection, which may be at fault—it was thought at one time by judges sitting in chambers that the decision in *In re New*,⁸⁷ extended by section 57 of the Trustee Act, 1925, justified the making of many orders which were later considered to have been made in excess of jurisdiction. I agree with the comments upon *In re New*⁸⁷ and upon section 57 which are contained in the majority judgment in the present case, and it is conceded by counsel that neither that decision nor the section can possibly justify the application now before your Lordships.

I now come to the case of *In re Duke of Leeds*⁸⁸ already mentioned. In that case freehold estates comprising a number of coal mines in Yorkshire and the North Midlands had been settled by the will of a testator who died in 1927. By the Coal Act, 1938, these mines were compulsorily acquired by the National Coal Commission, the vesting date being July 1, 1942, and the compensation therefor was duly assessed by the National Valuation Boards of each area and paid to the trustees of the will. Questions arose as to how the compensation moneys should be dealt with as between the persons entitled in succession under the will, and the matter came before Jenkins J. (as he then was). The judge decided all these questions and said⁸⁹: “In view of the unanimity of all parties in supporting the plaintiff’s contention, I suggested the possibility of authorizing the proposed commutation by way of compromise, if it could truly be shown to be for the benefit of all infant or unborn or unascertained persons interested or possibly interested under the settlement. It appeared, however, that this suggestion was not acceptable, and I was asked to decide the point one way or the other as a matter of construction of the Coal Act, 1938, and in particular paragraph 21 (2). This I have accordingly done. My decision against the plaintiff’s contention as a matter of legal right does not, of course, rule out the possibility of giving effect to it as a compromise or arrangement if shown to the satisfaction of the court to fulfil the condition mentioned above.”

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Mr. Wolfe informs us that in fact a compromise was subsequently approved by Jenkins J. under which, I understand, a certain lump sum was paid to the tenant for life out of the compensation moneys and the balance was to be invested as capital and held on the trusts of the will. He also informed us that compromises of a similar nature were sanctioned by the court in *In re Lucas*,⁹⁰ which immediately follows *In re Duke of Leeds*.⁹¹

My Lords, I should have been glad if I could have found it possible to draw some sound distinction between the two cases just mentioned and *Downshire*⁹² and *Blackwell*⁹² on the one hand, and the present application on the other. The majority in the Court of Appeal, as I understand their judgment, drew a line between schemes which involved⁹³ “a compromise or composition of beneficial interests,” such as the schemes in *Downshire*⁹⁴ and *Blackwell*,⁹⁴ and schemes such as the *Chapman*⁹⁴ scheme, where no such compromise or composition was involved. If such a line could be drawn, no doubt the schemes in *In re Duke of Leeds*⁹⁵ and *In re Lucas*⁹⁶ would fall on the right side of it. I do not, however, feel able to draw this line. I agree that there is a distinction in fact between the *Chapman*⁹⁷ scheme and the schemes in *Downshire*⁹⁷ and *Blackwell*,⁹⁷ and this is clearly pointed out in the majority judgment. Further, I think it might be possible to find some distinction in fact between *Downshire*⁹⁷ and *Blackwell*⁹⁷ on the one hand and *In re Duke of Leeds*⁹⁸ and *In re Lucas*⁹⁹ on the other. Yet all the five cases do involve an alteration in the ascertained and undisputed beneficial interests under a settlement.

For the reasons which I have set out, I fear at too great length, I am of opinion that the court has only claimed jurisdiction to make such an alteration in the maintenance cases already mentioned, and has frequently denied that it has such a jurisdiction in any other case. In saying this I am not overlooking the “salvage” cases, but they relate to administrative acts by trustees and not to alteration of beneficial interests.

I agree with the majority of the Court of Appeal in their rejection of the present application, and I cannot accept Mr. Russell’s argument based on the other cases which he has cited.

⁹⁰ [1947] Ch. 558.⁹¹ [1947] Ch. 525.⁹² [1953] Ch. 218.⁹³ Ibid. 265.⁹⁴ [1953] Ch. 218.⁹⁵ [1947] Ch. 525.⁹⁶ [1947] Ch. 558.⁹⁷ [1953] Ch. 218.⁹⁸ [1947] Ch. 525.⁹⁹ [1947] Ch. 558.

My Lords, it will already be apparent why I cannot agree with the conclusions of Denning L.J. in his dissenting judgment, but I feel bound to comment upon two passages in that judgment. Denning L.J. quoted the following passage from the judgment of Turner L.J. in *Brooke v. Mostyn*¹⁰⁰: "That this court has power "to compromise the rights and claims of infants and persons under "disabilities, when those rights and claims are merely equitable, "has not been and cannot be disputed. It is a power which has "been continually exercised by the court, and results almost "necessarily from the jurisdiction which the court exercises over "trustees. In the exercise of that jurisdiction the court may in "general order the trustees to deal with the trust property in "whatever mode it may consider to be for the benefit of "cestuis que trust who are infants or under disabilities . . . I "have thought it right to make these observations, because I "consider it of great importance that no doubt should be cast "upon this power of the court . . . The rights of infants and "incapacitated persons must in many cases be sacrificed if "the power be not maintained."

It is to be noted that *Brooke v. Mostyn*¹⁰¹ was a case of a true compromise of disputed rights, and the only question for decision was whether such a compromise could be set aside. In my view the observations just quoted, though one sentence is couched in very general terms, must be read as relating only to cases of true compromise where, to quote the first sentence, the court is compromising "the rights and claims of infants and "persons under disabilities." Denning L.J. went on to say¹⁰²: "This jurisdiction is not confined to cases where there is a dispute "about the extent of the beneficial interests, nor to cases of "emergency or necessity, but extends wherever there is a bargain "about the beneficial interests which is for the benefit of the "infants or unborn persons." In support of this observation he cited *In re Trenchard*,¹⁰³ *In re Wells*,¹⁰⁴ and the argument of Lord Parker, as junior counsel, in *In re New*.¹⁰⁵ But, as I have already said, I cannot regard these cases as supporting the proposition.

Later, Denning L.J. said¹⁰⁶: "The proposed scheme for the "Chapman settlement is more troublesome. We are told that the "lawyer who drew up the deed made a mistake. He did not have "in mind the statutory definition about property passing 'on the

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¹⁰⁰ (1864) 2 De G.J. & S. 373, 415.¹⁰¹ Ibid. 373.¹⁰² [1953] Ch. 218, 274.¹⁰³ [1902] 1 Ch. 378, 382.¹⁰⁴ [1903] 1 Ch. 848.¹⁰⁵ [1901] 2 Ch. 534, 543.¹⁰⁶ [1953] Ch. 218, 276.

H. L. (E.) “ ‘death’ for the purpose of death duties; and he included a
 1954 “ discretionary trust for common maintenance when he ought to
 CHAPMAN “ have omitted it. He ought to have left the children to receive
 v. “ maintenance equally instead of giving the trustees a discretion
 CHAPMAN. “ to grant more to one than the others. It is a small mistake but
 Lord Morton “ it means a difference of £30,000 in death duties. The mistake
 of Henryton. “ cannot be remedied under the strict doctrine of rectification
 “ because it is not a mistake in expressing the settlor’s intentions,
 “ but only a mistake as to the legal consequences. Nevertheless,
 “ I do not myself see why the mistake should not be corrected by
 “ the settlors themselves.” In regard to this passage I would
 say first, that counsel for all parties are agreed that the wishes
 of the grandparents as settlors are entirely irrelevant on the
 question of jurisdiction. By settling the property on certain trusts
 they have put it out of their power to alter these trusts, however
 much they may wish to do so. Secondly, it is not contended by
 counsel that there was any mistake, in the true sense of the word,
 in the present case. The trusts contained in the settlement are
 exactly the trusts upon which the settlors intended the settled
 property to be held. The present application arises only by
 reason of the fact that it was afterwards realized that these trusts,
 although perfectly proper and sensible in themselves, would or
 might have unfortunate results as regards death duties. Lastly, the
 question is not whether the court ought to have jurisdiction to alter
 the trusts in this case, but whether in fact it has that jurisdiction.

I would add, in amplification of remarks by the Master of
 the Rolls and Romer L.J. already quoted, that if the court had
 power to approve, and did approve, schemes such as the present
 scheme, the way would be open for a most undignified game of
 chess between the Chancery Division and the legislature. The
 alteration of one settlement for the purposes of avoiding taxation
 already imposed might well be followed by scores of successful
 applications for a similar purpose by beneficiaries under other
 settlements. The legislature might then counter this move by
 imposing fresh taxation upon the settlements as thus altered. The
 beneficiaries would then troop back to the Chancery Division
 and say, “ Please alter the trusts again. You have the power, the
 “ adults desire it, and it is for the benefit of the infants to avoid
 “ this fresh taxation. The legislature may not move again.”
 So the game might go on, if the judges of the Chancery Division
 had the power which the appellants claim for them, and if they
 thought it right to make the first move.

I would dismiss the appeal.

LORD ASQUITH OF BISHOPSTONE. My Lords, in this appeal counsel for the appellants began by taking his stand on an ambitious general principle of law: namely, that there resided in the Court of Chancery an inherent jurisdiction to vary the trusts of a settlement or a will in every case in which two conditions were satisfied, viz.: (1) that all adults interested in the trust dispositions consented, and (2) that the variation was plainly for the benefit of all interested parties other than adults, viz., infants and unborn persons. Speaking with much less familiarity upon these matters than most of my noble friends, I cannot but think this principle is too broadly stated, and respectfully agree with the conclusions and reasoning of my noble and learned friends, the Lord Chancellor and Lord Morton of Henryton.

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In practice, Courts of Chancery have asserted this jurisdiction mainly, if indeed not solely, in three classes of cases:

(a) Where the trust dispositions have provided for accumulations of income in favour of an infant during his minority without providing for his maintenance during that period: but this provision would be stultified if the infant were not maintained while the income was accumulating. The court has in such cases refrained from enforcing the letter of the trusts, and by authorizing maintenance has saved the infant from starving while the harvest designed for him was in the course of ripening.

(b) Where some event or development unforeseen, perhaps unforeseeable, and anyhow unprovided against by the settlor or testator, threatened to make shipwreck of his intentions: and it was imperative that something should be saved from the impending wreck. These are often referred to as the "salvage" cases: and many of the "maintenance" cases which I have classified separately could properly be subsumed under this wider class.

(c) Where there has been a *compromise* of rights (under the settlement or will) which are the subject of doubt or dispute. It is then often to the interest of all interested parties, adult or infant or unborn, to have certainty substituted for doubt, even if the supersession of a dubious right by an undoubted one may be doing beneficent violence to the terms of the trust: though it is perhaps inappropriate to speak of violence to terms to which different persons attribute a different meaning. Whether there is jurisdiction to do the same in reference to rights which are *not* in dispute is a point which lies near the centre of the present appeal, and to which I will revert.

Leaving this last point for the time being aside, I would

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venture to record my view that the inherent jurisdiction of the Court of Chancery in this sphere is limited to these three classes of cases: "maintenance" cases, "salvage" cases, and "compromise" cases: and that the court's exercise of jurisdiction in these three spheres is limited to those spheres and is not simply the exercise in particular circumstances of the far wider jurisdiction claimed for the court by counsel for the appellants—a jurisdiction limited only by two conditions: (a) consent of interested adults; (b) benefit to interested non-adults. If that wider principle had been valid, a formidable volume of judicial learning and forensic argument directed to the question whether the facts of a case bring it within the three privileged compartments must have been wasted. Why this expenditure of time and erudition if the alleged broad principle was always there, offering a short cut? Nor, speaking more generally, does English jurisprudence start from a broad principle and decide cases in accordance with its logical implications. It starts with a clean slate, scored over, in course of time, with ad hoc decisions. General rules are arrived at inductively, from the collation and comparison of these decisions: the rules do not pre-exist them.

Now it is argued that even if this be so, yet the third category or compartment creating jurisdiction—"compromise"—includes rearrangements of property rights or interests even where these are not in dispute. And certain cases—*In re Trenchard*,¹⁰⁷ *In re Wells*,¹⁰⁸ two cases under the Coal Mines Act (*In re Duke of Leeds*¹⁰⁹ and *In re Lucas*¹¹⁰ reported immediately after it) and the cases of *Downshire*¹¹¹ and *Blackwell*,¹¹¹ decided simultaneously with the present case (though in a different sense) by the Court of Appeal are prayed in aid as supporting this extension of the jurisdiction from cases of "compromise stricto sensu" to "quasi-compromise." And it is further argued that if these cases or some of them attract the jurisdiction, then so does the present case. As to this latter point, though I can see differences, I cannot see any material distinction between the *Downshire*¹¹¹ and *Blackwell*¹¹¹ cases and the present case.

But it will be observed (1) that until the twentieth century the category "compromise" had been construed as strictly confined to cases of disputed rights; (2) that in practice, once it is construed as including what I have termed "quasi-compromise," there is, it would seem, no logical stopping point short of the broad

¹⁰⁷ [1902] 1 Ch. 378.¹¹⁰ Ibid. 558.¹⁰⁸ [1903] 1 Ch. 848.¹¹¹ [1953] Ch. 218.¹⁰⁹ [1947] Ch. 525.

and loose principle which was contended for by the appellants and which, for reasons given above, seems to me untenable. None of the decisions since 1900, relied on by the appellants, are binding on your Lordships' House. Some of them can, I think, be distinguished on the lines indicated by my noble and learned friend, Lord Morton of Henryton. For instance, the case of *In re Wells*,¹¹² in my view, is a very special one and does not on a true view support the appellants' proposition. Subject to these considerations I would reassert the rule that a compromise in this connexion means a compromise in the strict sense and that the attempted creation of a category of quasi-compromise is invalid.

As to the effect more specifically of a decision in this sense on *In re Trenchard*,¹¹³ *In re Wells*,¹¹⁴ the two cases decided under the Coal Mines Act, and the cases of *Downshire*¹¹⁵ and *Blackwell*,¹¹⁵ I have had the advantage of reading in advance the opinion just delivered by my noble and learned friend, Lord Morton of Henryton, and would respectfully adopt his observations. I am of opinion that the appeal should be dismissed.

LORD COHEN. My Lords, I have had the advantage of reading in print the opinion delivered by my noble and learned friend, Lord Morton of Henryton. I agree with him in rejecting the main argument advanced by Mr. Gray for the appellants. Like him, I accept the reasons given by the majority of the Court of Appeal for rejecting that argument. In my opinion, the cases relied on by Mr. Gray are not examples of the unlimited jurisdiction for which he contends, but illustrate exceptions from the general principle that the court will give effect, as it requires the trustees themselves to do, to the intentions of the settlor or testator as expressed in the trust instrument.

In considering those cases I will adopt the grouping made by Mr. Gray and already stated by the noble and learned Lord. I agree with his comments on the first three groups, with the reservation that I do not think that the maintenance cases are the only real exception to the rule that the court will not alter beneficial trusts. My reasons for this reservation will appear from the observations I have to make on the scope of the exception which the Chancery Courts have adopted as regards the sanctioning of compromises on behalf of infants and possible after-born beneficiaries.

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My Lords, like the majority of the Court of Appeal, I think that this jurisdiction is not limited to compromises of disputed rights but extends to compromises in the wider meaning of that word, and had it not been that some of your Lordships take a different view, I should have been content to express my agreement with the reasoning of the Master of the Rolls and Romer L.J. on this point.

Lord Morton of Henryton sums up the arguments advanced against their conclusion somewhat as follows:—

I. The court's sanction of a compromise in the true sense, when the beneficial interests are in dispute, is not the exercise of a jurisdiction to alter those interests, for they are still unascertained. — ✓ B

II. *In re Trenchard*,¹¹⁶ which is the foundation of the majority judgment of the Court of Appeal on this point, is not a case of compromise in the broad sense but is “no more than the sanctioning by the court of a purchase by the trustees of the widow's “rights.” *which is surely a compromise?*

III. It is impossible to draw a line at which the jurisdiction to sanction a compromise in the broad sense ends or, put otherwise, it is impossible to draw a line at some point between the court's undoubted jurisdiction to sanction a compromise of disputed rights and alleged unlimited jurisdiction to alter beneficial rights to any extent provided that every person who is *sui juris* consents and the change is shown to be for the benefit of infants and after-born beneficiaries.

My Lords, I am not satisfied that the court, in sanctioning a compromise in the strict sense, is not exercising a jurisdiction to alter beneficial rights. It is true that in such a case the right has not been defined, but the right of the beneficiary is a right to that to which, upon its true construction, the will or settlement entitles him. The very essence of a compromise is that it may give each party something other than that which the will or settlement would, on its true construction, confer on him.

Nor am I able to accept the view that *In re Trenchard*¹¹⁶ involved nothing more than the purchase by the trustees of the widow's interest. Under clause 3 of the testator's will she was entitled only (a) to the use of the testator's residence so long as she desired to make it her permanent place of residence and remained the testator's widow, and (b) during that time to have the house and grounds kept up at the expense of the estate. If

¹¹⁶ [1902] 1 Ch. 378.

she ceased to reside, she would forfeit those benefits (the value of the tenantable repair provision being estimated at £350 a year). Under the arrangement sanctioned by the court she got £275 per annum, determinable only on remarriage—not by non-residence in the house. The arrangement, therefore, in my opinion, clearly involved an alteration of the quality of the beneficial interest of the widow. So far as the residuary legatees were concerned, the primary effect was to alter the quantum of what they would receive, but I am unable to see that it can properly be said that the only purpose and effect of the transaction was a purchase of the widow's interest. The summons asked a question as to compromise.¹¹⁷ Buckley J.¹¹⁸ himself described the proposal as a fair compromise for all parties. He was not using the term “compromise” in the strict sense, for the legal rights had already been decided. He was, I think, sanctioning a rearrangement of rights as between tenant for life and remaindermen which could not be carried out without the sanction of the court because infants were interested. The question of jurisdiction was argued, and Buckley J. seems to have felt no doubt as to his jurisdiction. In cases of this kind the court is always under the disadvantage that as most of such cases are heard in chambers there are few reported precedents. There may well have been earlier unreported cases in which the Chancery Courts had exercised their jurisdiction over trustees in a similar way. Be that as it may, the decision in *In re Trenchard*¹¹⁹ has stood unquestioned for 50 years and I see no reason why your Lordships should now overrule it.

I turn, therefore, to the third argument. My Lords, a distinguished member of this House once said, in another connexion, that while he might have difficulty in drawing a line, he had never had any difficulty in deciding on which side of it a particular case fell. I think that a comparison of the facts in *In re Downshire Settled Estates*¹²⁰ and *In re Blackwell's Settlement Trusts*¹²⁰ on the one hand, and the facts in *In re Chapman's Settlement Trusts*¹²⁰ which is now before your Lordships, illustrate where the line might be drawn.

In *In re Downshire Settled Estates*¹²⁰ and *In re Blackwell's Settlement Trusts*,¹²⁰ as in *In re Trenchard*¹²¹ and, I think, also in *In re Duke of Leeds*¹²² and *In re Lucas*¹²³ (which immediately follows that case) the court was dealing with compromises in the

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¹¹⁷ [1902] 1 Ch. 380.¹¹⁸ Ibid. 385.¹¹⁹ [1902] 1 Ch. 378.¹²⁰ [1953] Ch. 218.¹²¹ [1902] 1 Ch. 378.¹²² [1947] Ch. 525.¹²³ [1947] Ch. 558.

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broad sense between tenants for life on the one hand and remaindermen on the other hand; they were not varying the rights inter se of parties whom the testator had placed on an equality. In *In re Chapman's Settlement Trusts*,¹²⁴ on the other hand, there was no question of compromise between tenants for life and remaindermen; the court was being asked to vary the rights inter se of a class which the testator had directed should be treated in a particular way. As the majority of the Court of Appeal said in the present case,¹²⁵ what is proposed is not "a com-
" position of rights in any real sense at all. It is nothing more
" than a rearrangement of beneficial interests which, to the extent
" that it might prove to be of advantage to some members of
" the class, would correspondingly operate to the prejudice of
" others."

My Lords, I have, I hope, said enough to show why I think that the Court of Appeal were right in allowing the appeals in *In re Downshire Settled Estates*¹²⁶ and *In re Blackwell's Settlement Trusts*,¹²⁶ and in dismissing the appeal in *In re Chapman's Settlement Trusts*,¹²⁶ and why, though for different reasons, I agree that the appeal to your Lordships' House should be dismissed.

I cannot sit down without expressing my doubt whether there is any foundation for the suggestion made by Denning L.J. that the effect of your Lordships' decision may be that schemes sanctioned in the past could be ignored by the Revenue and by all persons not sui juris. The High Court is a superior court and the control of trustees is a matter within its jurisdiction. It would take a good deal of argument to satisfy me that its orders were a nullity and that trustees were not fully protected by orders made by that court in the exercise of that trust jurisdiction even though your Lordships may, in a later case, have said that the jurisdiction had been wrongly exercised.

Appeal dismissed.

Solicitors: *Blundell, Baker & Co. for Wheldon, Houlshby; Moore & Armstrongs, South Shields; Treasury Solicitor.*

¹²⁴ [1953] Ch. 218.

¹²⁶ [1953] Ch. 218.

¹²⁵ Ibid. 265-6.

MINISTER FOR PUBLIC WORKS . . . APPELLANT;
 AND
 CHRISTOPHER BOWES THISTLETHWAYTE
 AND ANOTHER RESPONDENTS.

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 July 22.

ON APPEAL FROM THE FULL COURT OF THE SUPREME COURT
 OF NEW SOUTH WALES.

Australia (New South Wales) — Compulsory purchase — Resumption of land — During period of temporary sales control — Determination of compensation — Principles applicable — Evidence — Admissibility — Public Works Act, 1912 (N. S. W.), ss. 45 (3), 124 — National Security (Economic Organization) Regulations (Commonwealth), reg. 6.

Compulsory Purchase.

In determining the amount of compensation payable on the compulsory resumption in 1946 of vacant land belonging to the respondents in New South Wales under the Public Works Act, 1912, of that State at a time when the price at which land might be sold and purchased was temporarily controlled pursuant to the Commonwealth National Security (Economic Organization) Regulations, and when there was accordingly no free market, the date of resumption was the relevant date for the purposes of compensation, and the proper measure of the compensation to which the respondents were entitled—and it was the value of the land to the owner which had to be ascertained—was not the price which the Treasurer would have approved under the price control regulations on a sale of the land on the date of resumption, but the price which a vendor willing but not anxious to sell would agree to, if he were allowed, and a willing purchaser would give to obtain the land, although in his turn he would be subject to the control of land sales in re-selling.

When the subject-matter of control was the sale of land suitable for development and the control was of a temporary nature and might reasonably be expected to be lifted in the near future—at the date of resumption in the present case hostilities in the Second World War had ceased for over a year—circumstances were present which permitted of differentiation of a case such as this from others involving consumable goods or goods which would ordinarily be suitable for immediate sale. Whatever formula was adopted, it must be one which gave effect in such cases as the present to the element of value to the owner in being deprived of his right to retain his property with a view to sale in the future at a date which might reasonably be expected to be not far distant at a price which would almost certainly exceed the present controlled price.

* *Present*: LORD PORTER, LORD OAKSEY, LORD REID, LORD TUCKER, and LORD ASQUITH OF BISHOPSTONE.

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The Commonwealth v. Arklay (1952) 87 C.L.R. 159 applied: the reasoning of the judgment in that case stood independently of the requirement in section 51 (xxxi) of the Commonwealth Constitution that legislation for the acquisition of property should afford just terms, and the presence of that constitutional element in that case was not sufficient to distinguish it from the present case.

Assuming that sections 5, 68 and 70 of the Valuation of Land Act, 1916, standing alone might have resulted in some modification in the basis of assessment of compensation under the Public Works Act, 1912, the effect of the proviso to section 9 (1) of the Land and Valuation Court Act, 1921, which enacted that the court hearing claims for compensation in resumption cases "shall give effect "to any provision of the Act under which the land is acquired, "which prescribes a basis for, or matters to be considered in, the "assessment of compensation," was to restore the basis of assessment under the Act of 1912 unimpaired.

Further, in assessing the amount of compensation, evidence was in the circumstances admissible (a) of prices obtained on sales effected, after the termination of land sales control, of individual residential lots situated in the neighbourhood of the subject land and comparable to those into which it would be subdivided; (b) of the estimated cost shortly after the termination of control of road construction and drainage and other works necessary for the development of the subject land in subdivision; and (c) of the opinions of expert valuers founded upon, inter alia, the materials mentioned in (a) and (b), as to what price the subject land might be expected to have realized if sold in globo shortly after the termination of control.

Judgment of the Full Court of the Supreme Court of New South Wales affirmed.

APPEAL (No. 47 of 1953), by leave of the Supreme Court of New South Wales, from a judgment of that court (September 28, 1953) upon a case stated by Sugerman J. (the judge of the Land and Valuation Court) (August 14, 1953).

By a judgment dated March 20, 1953, Sugerman J. had determined the amount of compensation for the compulsory resumption for public purposes of certain lands of the respondents in proceedings brought by the respondents against the appellant under the Public Works Act, 1912. The judge considered himself bound by the decision of the High Court of Australia in *The Commonwealth v. Arklay*¹ and assessed compensation on the principle held to be applicable in that case. It was held in *Arklay's* case¹ that "in estimating the value of "land to an owner dispossessed during controls, the valuer should "estimate the price which a vendor willing but not anxious to

¹ (1952) 87 C.L.R. 159.

“sell would agree to, if he were allowed, and a willing purchaser
 “would give to obtain the land, although in his turn he would be
 “subject to the controls in re-selling.” The Supreme Court
 (Street C.J., Owen and Herron JJ.) considered the present case
 indistinguishable from *Arklay's* case¹ by which they were bound
 and answered the questions in the case stated accordingly.

The appeal was not argued at length before the Supreme Court as they were informed that its purpose was to obtain a reconsideration of *Arklay's* case¹ by Her Majesty in Council unless the court were of opinion that the present case could be distinguished from that case on the ground that the judgment of the High Court in *Arklay's* case¹ was based upon, or largely influenced by, the requirement in section 51 (xxxi) of the Constitution that legislation for the acquisition of property should afford just terms.

The appellant's written case in the present appeal was framed in the same way. It contended that the decision in *Arklay's* case¹ was erroneous and should be disapproved or, alternatively, that it could be distinguished by reason of the constitutional element present therein.

1954. June 15, 16, 17, 21 and 22. *J. D. Holmes Q.C.* (Australia) and *R. Else-Mitchell* (Australia) for the appellant. The main question is whether, in determining the compensation for resumption of land in New South Wales, at a time when the terms and conditions of sale, including price, were controlled by the Treasury of the Commonwealth pursuant to legislative powers, there may be included in the amount an addition to the market value of the land of a sum for what has been called in the cases “retention value,” that is, a sum to compensate the owner for the present value of the enhanced price which might ultimately be obtained for the land at a time when there was no control by the Treasury. A shorter way of putting the main question is: whether an expropriated owner of land may obtain by way of compensation a greater sum than by law he would be permitted to receive if he sold his land on the date of resumption.

The particular legislation under which this resumption was made was the Public Works Act, 1912, and the relevant control which operated at the date of resumption is regulation 6 of the National Security (Economic Organization) Regulations, made under the National Security Act, 1939-46. The way the matter

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has now worked out is not entirely based on section 124 of the Public Works Act, because in 1916 the Valuation of Land Act, 1916, of New South Wales, was introduced, section 5 of which provides that: "The improved value of land is the capital sum " which the fee-simple of the land might be expected to realize " if offered for sale on such reasonable terms and conditions as a " bona-fide seller would require." And by section 68 of the Act of 1916: "The valuation under this Act . . . of the improved " value of any land which may after the passing of this Act be " resumed . . . under . . . the Public Works Act, 1912, . . . shall, " notwithstanding the provisions of any such Act, be held . . . to " be the value of the land resumed . . . and the improvements " thereon, . . . but shall not exclude the rights of a claimant " for compensation for forced sale or disturbance of business or " otherwise, or for any special value which the land may have " to the owner, . . ." The meaning of section 5 of the Act of 1916 was dealt with in *O'Donohoe v. Valuer-General*.² In his judgment in the present case, Sugerman J. said that "for present " purposes it is sufficient that, in my opinion, the 'retention " 'value' pursuant to *Arklay's case*³ is either a 'special value " 'which the land may have to the owner' (that is, as founded " on the dispossessed owner's loss of *his* liberty to retain the land " until he should be free to dispose of it for more than the " controlled price), or a form, appropriate to the peculiar circum- " stances and authoritatively held to be included in the 'value of " 'the land' in those circumstances, of 'compensation for forced " 'sale.' Thus, in my opinion the principles laid down in *Arklay's " case*³ do not affect the determination of the 'improved value' " as defined by section 5 of the Valuation of Land Act, 1916-51. " But they are relevant to the determination of 'the value of the " 'land' under section 124 of the Public Works Act, 1912, for the " purpose of determining the compensation to be paid in respect " of a resumption effected under that Act. And their operation for " that purpose is preserved by the saving provisions of section 68 " of the Valuation of Land Act."

It is submitted that section 68 will not do what Sugerman J. there said. This expression "special value to the owner" does not in terms appear in section 124 of the Act of 1912, but only in section 68 of the Act of 1916; it is also found in cases in this country, and it was then the custom evidently to give in addition to potential value of the land an additional sum in some rare

² (1949) 17 L.G.R. 112.³ 87 C.L.R. 159.

type of case where a particular owner as against any other owner suffered some damage as a result of the resumption: *Pastoral Finance Association Ltd. v. The Minister*.⁴ Potential value is not value to the owner in the sense used in the *Pastoral Finance Association* case⁴; what was being discussed in that case was value special to that owner of that land; that is all that that case was about. Section 68 of the Act of 1916 recognizes special value of land as an element in value in section 124 of the Act of 1912. There is no statute in New South Wales which gives a claimant a right to compensation for a forced sale. It is submitted that as a matter of construction the expression "forced sale" in section 68 means or is directed to "forced sale or disturbance of a business." The objective in 1916 was to lay down a comprehensive method of valuation for rating and taxing and also for assessing compensation.

In determining the compensation or value of the land in question the principles set out in *Spencer v. The Commonwealth*⁵ should be adopted and applied, that is to say, the compensation is the price which a willing vendor might reasonably expect to obtain from a willing purchaser at the date of resumption. *O'Donohoe's* case⁶ was one of an objection to valuation, and the judge (Sugerman J.) made it clear that what he had in mind was not to allow anything for "retention value" as a matter of principle.

Coming now to *Arklay's* case⁷ and the reference in it to section 51 (xxxi) of the Commonwealth of Australia Constitution, which confers a power on the Commonwealth to acquire on just terms, the general effect of that provision of the Constitution was stated in *Nelungaloo Pty. Ltd. v. Commonwealth of Australia*⁸: "The placitum creates a power to acquire property for Commonwealth purposes; but it is a power sub modo, for it is a power "to acquire on just terms and not otherwise." The particular Act involved in *Arklay's* case⁷ was the Commonwealth Lands Acquisition Act, 1906-36, which is very like the Public Works Act, 1912. It is submitted, first, that *Arklay's* case⁷ is distinguishable, having been decided on constitutional grounds not applicable to New South Wales. It is clear on the judgment in that case that the High Court gave a meaning to "value" in that statute having regard to the constitutional limitation on the Commonwealth power. If that is the ratio of that case, then it does not touch the question which has been argued here. Secondly, if that first

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⁴ [1914] A.C. 1083, 1087.⁷ 87 C.L.R. 159.⁵ (1907) 5 C.L.R. 418.⁸ [1951] A.C. 34, 50.⁶ 17 L.G.R. 112.

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submission is wrong, and if one gets some element of value in section 124, it still has to be found in section 68, and that, it is submitted, cannot be done; if potential value is in section 124, section 68 has cut it down. *Arklay's* case⁷ puts special value on one side, and in that conception of value it has dealt with forced sale of a business; so that those two items in section 68 do not get any support from *Arklay's* case⁷; and therefore in so far as *Sugerman J.* in the present case used those items to bring retention value back he does not get any support from *Arklay's* case.⁷ All the provisions of section 68 (2) (c) of the Valuation of Land Act are quite different from special value provisions, and, it is submitted, cannot be taken literally, for if one does, it means that the legislature has done a lot of things which it did not need to do, and a limited effect must be given to them.

Restrictions imposed by the legislature upon the sum at which a vendor may sell his property must be taken into account when the value of that property is being determined whether for the purpose of compensation or of rating: *Priestman Collieries Ltd. v. Northern District Valuation Board*⁹; all the considerations which have been suggested as applying to persons owning land and wishing to sell it in due course were all relevant there, and though the statute was different the considerations are precisely the same.

With regard to the question of the admissibility of evidence as to value and other matters after the lifting of controls, see *Longworth v. Commissioner of Stamp Duties*,¹⁰ where the Supreme Court dealt with this question in the proper way, and what was there said is adopted mutatis mutandis as part of this argument as to the critical date here.

Summarizing: (1) In this case the controlled price at the date of resumption is the measure of compensation, because that is the improved value ascertained under section 5 of the Valuation of Land Act, 1916, and there is no element of forced sale or disturbance of business or otherwise or special value to the owner which can under section 68 of that Act be added to the improved value. (2) *Arklay's* case¹¹ is restricted to acquisitions under laws which are designed to conform to the constitutional requirements of section 51 (xxxi) of the Constitution, and has no application to a resumption under State law or to the assessment of compensation under the Public Works Act and the Valuation of Land Act. (3) Alternatively, the test of value, whether under section 5 of the

⁷ 87 C.L.R. 159.⁹ [1950] 2 K.B. 398.¹⁰ (1953) 53 N.S.W., S.R. 342.¹¹ 87 C.L.R. 159.

Valuation of Land Act or section 124 of the Public Works Act, presupposes a willing though hypothetical vendor and therefore restricts the amount to the controlled price. *Arklay's case*,¹¹ so far as it purported to lay down any principle of general application to the contrary, was wrongly decided. (4) If *Arklay's case*¹¹ is applicable in determining the value of the land, or if for some other reason value is not restricted to the controlled price, (a) the evidence set out in paragraph 12 (A), (B) and (C) of the case stated (see the judgment of the Board) was inadmissible; and (b) whatever the rule of evidence be as to the admissibility of matters subsequent to the date of resumption, no evidence is admissible of matters arising after the lifting of controls. (5) The questions in the case stated should be answered: (1) (a)—No; (1) (b)—Yes. (2)—Does not arise. (3)—Does not arise. Alternatively, if (1) (a) is answered Yes, or an answer is given which would result in a negative to (1) (b), then questions (2) and (3) should each be answered No.

M. F. Hardie Q.C. (Australia) and *J. G. Le Quesne* for the respondents. On the question raised by this appeal the judgment of the Supreme Court was right in all respects. Section 124 of the Public Works Act determines the right in the present action. The appellant in his reasons says that "the test laid down in *The Commonwealth v. Arklay*¹¹ violates the fundamental principles "whereby the valuation of land is determined, and is wrong and "should be disapproved," but no reason has been put before the Board for suggesting that that case was wrongly decided. It was said for the appellant that it had no application to the present case for two reasons: because the decision was based on an interpretation of the Federal Lands Acquisition Act which has to be construed in the light of the constitutional provision conferring power on the Federal Parliament to legislate as to the acquisition of property; and alternatively, that in any event if the respondents did have a right to receive compensation on the *Arklay* basis, looking at section 124 of the Public Works Act alone, they lost that right by virtue of the specific provisions of sections 5 and 68 of the Valuation of Land Act of 1916.

The argument based on sections 5 and 68 was not developed or put to the Supreme Court. It is not necessary for the respondents to point to anything in section 68 to give them the right to retention value. Section 124 of the Public Works Act gives the respondents a right to the assessment of compensation in

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¹¹ 87 C.L.R. 159.

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accordance with the principle of *Arklay's* case.¹¹ It was said in *Inland Revenue Commissioners v. Glasgow and South-Western Railway Co.*¹² that "in ascertaining what is the value of the land " it is extremely common, indeed it is inevitable, to go into a " great number of circumstances by which that which is proper " compensation to be paid for the transfer of one man's property " to another is to be ascertained." With regard to *Cedars Rapids Manufacturing and Power Co. v. Lacoste*,¹³ two points are stressed—it is the present value to the owner which has to be determined, and it is the present value of all advantages which the land possesses: the High Court in *Arklay's* case¹⁴ really applied the latter proposition to a very special set of facts in Australia. *Pastoral Finance Association Ltd. v. The Minister*¹⁵ is also cited on "the value of the land to the owner." In the present case the trustees had held the land for years, waiting for an appropriate time to sell it; it had a value to them at the time of resumption. In *Spencer v. The Commonwealth*¹⁶ it was said: "The test of " value of land is to be determined, not by inquiring what price a " man desiring to sell could actually have obtained for it on a " given day, i.e., whether there was in fact on that day a willing " buyer, but by inquiring 'what would a man desiring to buy the " land have had to pay for it on that day to a vendor willing to " 'sell it for a fair price but not desirous to sell?' " That citation is stressed as indicating the idea behind the judgment of the High Court in *Arklay's* case.¹⁷

Turning to cases on the question of valuing property during a period of controls, in *Nelungaloo Proprietary Ltd. v. The Commonwealth*,¹⁸ it was said that "the hypothesis of a 'free market' " should, in its application to questions of compensation, be taken " to mean only that the assessing tribunal should endeavour to " ascertain the price which a willing purchaser would give to a " not unwilling vendor of the property in question, neither being " under any compulsion, the price to be assessed at the value to " the owner." It is submitted that the judgment in *Arklay's* " case¹⁹ is in accordance with that last cited passage—the two are in line. The respondents are entitled to the true and real pecuniary equivalent of their land that was taken. Reliance is not placed on the actual decision in the *Nelungaloo* case²⁰ but the

¹¹ 87 C.L.R. 159.¹² (1887) 12 App.Cas. 315, 320.¹³ [1914] A.C. 569, 576.¹⁴ 87 C.L.R. 159.¹⁵ [1914] A.C. 1083, 1087.¹⁶ (1907) 5 C.L.R. 418, 432.¹⁷ 87 C.L.R. 159.¹⁸ (1948) 75 C.L.R. 495, 540.¹⁹ 87 C.L.R. 159.²⁰ 75 C.L.R. 495.

dicta are quoted as being the ratio decidendi of *Arklay's* case,²¹ and as being dicta in a case where property had been taken compulsorily at a time when the ordinary law of supply and demand did not operate. Again, the problem in *The Moreton Club v. The Commonwealth*²² was somewhat similar to that which confronted the High Court in *Arklay's* case,²¹ and again indicates the same line of reasoning; the principles there applied are sound. *McMahon v. Housing Commission of New South Wales*²³ is important as it appears to be the first reported case in which any Australian court dealt with the problem of the value of land resumed in time of control. Although no specific amount was given in respect of "retention value," the judge clearly recognized that there was that intermediate position between control price and the price which could have been obtained had there been no regulations. The actual decision in *Lovegrove v. Housing Commission of New South Wales*²⁴ is in some respects similar to that in *McMahon's* case,²⁵ and reliance is placed on it as containing dicta on the lines of the ratio decidendi in the earlier case. Reference may also be made to two South Australian cases where the same principle was recognized and applied: *Burford & Sons v. Commonwealth of Australia*²⁶ and *Ellis v. Commonwealth of Australia*²⁷—what was said in those two cases applies aptly to the present case.

That appears to be the state of the authorities when *Arklay's* case²⁸ was decided, and that case is important in that the Full Court laid down in clear language the test to apply in determining value when there is no free market and there are controls in force of a temporary nature which had the effect of precluding owners of land from obtaining full value. It is not correct to say that that decision can be explained, and only explained, by reason of the constitutional position. It was said in *Arklay's* case²⁹ that "on this question we have no doubt that under the Lands Acquisition Act in estimating the value of land to an owner dispossessed during controls, the valuer should estimate the price which a vendor willing but not anxious to sell would agree to, if he were allowed, and a willing purchaser would give to obtain the land, although in his turn he would be subject to the controls in reselling." That is the ratio decidendi of that case, and it is submitted that it applies to the language of section 124 in the

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²¹ 87 C.L.R. 159.²² (1948) 77 C.L.R. 253, 256.²³ (1946) 16 L.G.R. 54.²⁴ (1949) 17 L.G.R. 83.²⁵ 16 L.G.R. 54.²⁶ [1949] S.A.S.R. 310.²⁷ [1950] S.A.S.R. 30.²⁸ 87 C.L.R. 159.²⁹ Ibid. 173.

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present case. It is a principle which is inherent in the concept of value of the land in resumption legislation—value of the land to the owner as established by earlier decisions—and it is a principle which is implicit in the test laid down by the High Court in the present case, namely, that the valuer is to value on the basis of a hypothetical vendor and purchaser free to make what bargain they think fit, but to take into consideration all relevant facts existing at the date when the valuation is to be made.

The principles established by the decision of the High Court in *Arklay's* case²⁸ are not restricted to resumptions under the Lands Acquisition Act, 1906–36, but apply equally to resumptions under the Public Works Act, 1912. The principle of “a willing “vendor” does not impute to a dispossessed owner of land a willingness to sell at the controlled price. The price at which the Treasurer or his delegate would have consented under the regulations to a purchase of the lands on the date of resumption was not based upon, nor did it reflect, the value of the lands as at that date, but was based upon matters of policy and was rightly rejected as the proper measure of compensation. The price did not establish or prove the market value of, or determine the amount of compensation payable for, land resumed during the continuance of the regulations. The regulations did not prescribe nor purport to prescribe the measure or amount of compensation for land resumed during their continuance. The regulations constituted at most a factor or circumstance to be taken into account in determining the amount of compensation, but were not the determining or decisive factor or circumstance. The right of retention and the right of sale on the termination of controls at an enhanced price constituted part of, or were incidental to, the estate or interest of the respondents in the lands, and were rightly taken into account in determining “the value of the lands to the “owner.”

While it is not suggested that *Poplar Assessment Committee v. Roberts*³⁰ is on all fours with the present case, what was said in the judgments there applies with greater force to a case like the present. [Reference was also made to *Priestman Collieries Ltd. v. Northern District Valuation Board*.³¹]

In support of the second ground of his argument that *Arklay's* case³² has no application to the present case, the appellant relied on the provisions of sections 5 and 68 of the Valuation of Land

²⁸ 87 C.L.R. 159.³⁰ [1922] 2 A.C. 93.³¹ [1950] 2 K.B. 398.³² 87 C.L.R. 159.

Act, 1916. If section 124 of the Public Works Act, 1912, in referring to "the value of the land" used that phrase in the same sense in which it was held to have been used in *Arklay's* case³² and, by the Privy Council, in *Pastoral Finance Association Ltd. v. The Minister*,³³ then the submission for the appellant is that sections 5 and 68 of the Act of 1916 have the effect of limiting and restricting that phrase as used in section 124. As already indicated, that point was not taken below, nor was it taken in the appellant's printed case, and it is submitted that he is not at liberty to take it at this late stage. Assuming, however, that the Board hold that it is open to him, it is submitted first, and generally, that it is not necessary for the purposes of the respondents' case in order to hold the judgment in their favour to point to any specific section in the Valuation of Land Act preserving their right, so long as the Board is satisfied that, taking the Act of 1916 as a whole, it does not cut down the rights the respondents acquired under section 124 of the Act of 1912. There is nothing in the Act of 1916 which clearly cuts down the right of a dispossessed owner to receive the full money equivalent of his property.

With regard to the right of the owner under section 68 to receive compensation for forced sale, the phrase "forced sale" in this section cannot be limited to the forced sale of a business. "Forced sale" is another way of expressing compulsory purchase. When Parliament passed the Act of 1916 it was careful to make it quite plain that rights of dispossessed owners conferred by other Acts should not be cut down or limited or restricted in any way. [Reference was made to Browne and Allan's *Law of Compensation*, 1896 ed., pp. 609, 611.] If forced sale means in this context an expression equivalent to compulsory purchase, then these trustees have lost by this compulsory purchase the retention value. [Reference was also made to Cripps on *Compensation*, 9th ed., vol. 1, p. 423, and vol. 2, p. 906, and to *Geita Sebea v. Territory of Papua*.³⁴]

It is submitted, alternatively, that "special value to the owner" in section 68 means any value over and above what the property would bring in the market—in the present case the difference between the value of the property to the owner ascertained in accordance with the *Arklay* formula and its controlled value. This concept of special value to the owner has been introduced

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³² 87 C.L.R. 159.³³ [1914] A.C. 1083.³⁴ (1941) 67 C.L.R. 544, 559.

J. C. into compensation law to ensure that the owner receives the true value to him.

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Finally, if Parliament has by sections 5 and 68 of the Act of 1916 altered the basis of compensation under section 124 of the Public Works Act, it has restored the original position by the first proviso to section 9 of the Land and Valuation Court Act, 1921.

Questions (2) and (3) of the case stated have to be considered on the footing that *Arklay's* case³⁵ was rightly decided. It is clear that the respondents are entitled to something more than the controlled price, and the question is how it is to be calculated.

J. D. Holmes Q.C. in reply. *McMahon's* case³⁶ will not bear the argument that one can go beyond the controlled price—the decision itself did not go beyond the controlled price—and it does not support *Arklay's* case³⁷ and, so far as it goes, does not operate to support the respondents' case here. The appellant does not lose anything by *Lovegrove's* case,³⁸ which does not touch the proposition here in question. [Reference was also made to *O'Donohoe's* case.³⁹] The *Nelungaloo* case⁴⁰ does not support the respondents here, nor does the appellant derive any particular comfort from it; it deals with quite a different problem and is not an authority of any value in this case at all. The *Moreton Club* case⁴¹ is a case of special value, and as special value in the sense in which the appellant here uses special value it can play no part in this discussion; there are features in it which take it right away from the point raised in the present case. [Reference was also made to the *Arklay* case,⁴² and to the *Burford*⁴³ and *Ellis*⁴⁴ cases.]

With regard to section 68 of the Act of 1916 and section 124 of the Act of 1912, sections 39 and 43 of the Act of 1916 show that the argument for the respondents cannot stand. Section 68 cuts down section 124. "Forced sale or disturbance of business or "otherwise" all stand together. [Reference was made to *Collins* on *Valuation of Property, Compensation and Land Acts*, 3rd ed. (1949), pp. 215–16, and to *In re Wilson and the State Electricity Commission of Victoria*⁴⁵—that case was decided on a section which is identical with section 124 of the Public Works Act, 1912.]

Section 9 of the Land and Valuation Court Act, 1921, still leaves the task of valuing to be determined under section 124 of

³⁵ 87 C.L.R. 159.

³⁶ 16 L.G.R. 54.

³⁷ 87 C.L.R. 159.

³⁸ 17 L.G.R. 83.

³⁹ 17 L.G.R. 112.

⁴⁰ 75 C.L.R. 495.

⁴¹ 77 C.L.R. 253.

⁴² 87 C.L.R. 159, 174.

⁴³ [1949] S.A.S.R. 310, 312–3.

⁴⁴ [1950] S.A.S.R. 30, 35, 38.

⁴⁵ [1921] V.L.R. 459, 464.

the Act of 1912 in accordance with the way one was told to do it under section 68 of the Act of 1916. Section 9 is still operating on the provisions of section 124; it is not reinstating something which has gone out; it is leaving section 124 to operate as it is controlled by other legislation—section 68.

[Reference was also made to *Longworth v. Commissioner of Stamp Duties*.⁴⁶]

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July 22. The judgment of their Lordships was delivered by LORD TUCKER. On the hearing of this appeal an elaborate argument was addressed to their Lordships in support of a contention that the New South Wales legislation was wholly different from the legislation in question in *Arklay's* case¹ and that sections 5, 68 and 70 of the Valuation of Land Act, 1916, had established a new statutory basis for the assessment of compensation for compulsory resumption under certain specified statutes, including the Public Works Act, 1912, which is the one presently relevant, and that the construction of these sections presented a problem quite different from that involved in *Arklay's* case,¹ which was concerned with the construction of the Lands Acquisition Act, 1906–1936, in the context of the National Security (Economic Organization) Regulations.

Their Lordships would have been reluctant to allow a matter of this importance to be raised at this late stage and without the benefit of the views of the Supreme Court thereon, but they do not consider it necessary or desirable to explore this question further in view of the proviso to section 9 (1) of the Land and Valuation Court Act, 1921. This section deals with the hearing of claims for compensation in resumption cases and provides that they “shall be heard and determined in the following way, and “not otherwise—(a) where the claim does not exceed one “hundred pounds, by a stipendiary or police magistrate or any “two justices in petty sessions; and (b) where the claim exceeds “one hundred pounds, by the court without a jury: Provided that “for the purpose of any such determination the judge or magistrate or justices shall give effect to any provision of the Act, “under which the land is acquired, which prescribes a basis “for, or matters to be considered in, the assessment of “compensation.”

In the opinion of their Lordships, assuming sections 5, 68 and 70 of the Valuation of Land Act, 1916, standing alone might have

⁴⁶ 53 N.S.W., S.R. 342.

¹ (1952) 87 C.L.R. 159.

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resulted in some modification in the basis of assessment of compensation under the Public Works Act, 1912, the effect of this proviso is to restore that basis unimpaired.

Before proceeding to the questions of substance involved in this appeal, viz., the correctness or otherwise of the decision in *Arklay's* case¹ and the admissibility of certain evidence relating to sales after the removal of price control, it will be convenient to dispose of the submission that the presence in *Arklay's* case¹ of the constitutional element is sufficient to distinguish it from the present. Their Lordships are in agreement with the Supreme Court in holding that the suggested distinction is not a valid one. It is true that this element of difference existed, it is also true that it received some emphasis in the judgment, but none the less their Lordships are of opinion that the reasoning of that judgment must stand or fall independently.

It will now be convenient to refer to the statutory provisions relevant to *Arklay's* case¹ and the present. Section 28 of the Commonwealth Lands Acquisition Act, 1906-36, is in the following words: 28.—(1) “In determining the compensation under “this Act, regard shall be had . . . to the following matters:—
“(a) the value of the land acquired; (b) the damage caused by “the severance of the land acquired from other land of the “person entitled to compensation; and (c) the enhancement or “depreciation in value of other land adjoining the land taken or “severed therefrom of the person entitled to compensation by “reason of the carrying out of the public purpose for which the “acquired land was acquired.”

Section 45 (3) of the Public Works Act, 1912 (N.S.W.), provides:—“Every person shall upon asserting his claim as “hereinafter provided and making out his title in respect of any “portion of the said resumed lands be entitled to compensation “on account of such resumption in manner hereinafter provided.”

Section 124 reads:—“For the purpose of ascertaining the “purchase money or compensation to be paid, regard shall in “every case be had by the magistrates, arbitrators, surveyors, “valuators, or jury (as the case may be) not only to the value of “the land to be purchased or taken, but also to the damage “(if any) caused by the severing of the lands taken from other “lands of the owner, or by the exercise of any statutory powers “by the Constructing Authority otherwise injuriously affecting “such other lands; and they shall assess the same according

¹ 87 C.L.R. 159.

“to what they find to have been the value of such lands, estate, or interest at the time notice was given, or notification published, as the case may be, and without being bound in any way by the amount of the valuation notified to such claimant, and without reference to any alteration in such value arising from the establishment of railway or other public works upon or for which such land was resumed.”

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The National Security (Economic Organization) Regulations (relevant to *Arklay's* case¹ and the present) are:—“6. (1) Except as provided by this Part, a person shall not, without the consent in writing of the Treasurer—(a) purchase any land; (b) take an option for the purchase of any land; (c) take any lease of land; (d) take a transfer or assignment of any lease of land; or (e) otherwise acquire any land.

“(2) Nothing in this regulation shall prevent—. . . (e) any transaction to which the Commonwealth, a State, or an authority of the Commonwealth or a State, or to which any person acting on behalf of the Commonwealth, a State, or an authority of the Commonwealth or a State is a party. . . .

“(5) In the case of an application for consent to purchase any land the application shall be accompanied by a valuation of the land by an independent approved valuer, unless, in special circumstances, the Treasurer dispenses with such a valuation.”

The respondents are trustees of the will of William Moore, deceased, and were at all material times the registered proprietors for an estate in fee simple of the lands described in the schedule to a notification of resumption by the appellant published in the New South Wales Government Gazette dated September 20, 1946. The lands had been developed as a golf course and were being so used at the date of resumption. The land was suitable for development by subdivision into residential lots, for which purpose the construction of roads and drainage and other works would be necessary.

At the date of resumption, which is the relevant date for the purposes of compensation, the Commonwealth National Security (Economic Organization) Regulations were in force. These regulations ceased to apply in New South Wales on September 20, 1948. They were replaced on that date by the Land Sales Control Act, 1948, of New South Wales, the provisions of which were similar to those of the regulations, but vacant land was

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exempted from the operation of the Act by regulations made thereunder. The land in question was treated as vacant land. Land sales control in New South Wales was not permanently retained and no longer operates.

The resumption having taken place during a time when the price control regulations were in force and when there was accordingly no free market for land, the main issue before the Valuation Court was the proper measure of compensation. The respondents contended that it should be assessed in accordance with the principles approved by the High Court in *Arklay's* case,¹ whereas the appellant contended that the price should be determined at the figure at which the Treasurer would have consented to a purchase of the land at the date of resumption.

In *Arklay's* case,¹ where the same question arose, the court, after stating that "value" in the context in question meant the value of the land to the owner, and referring to the formula for ascertaining this value which had been laid down in Australia in *Spencer v. The Commonwealth*² in these terms:—"What is required is an estimate of the price which would have been agreed upon in a voluntary bargain between a vendor and purchaser each willing to trade but neither of whom was so anxious to do so that he would overlook ordinary business considerations," proceeded as follows³:—"This test requires considerable adaptation when compulsory acquisition occurs in a period of controls. The test presupposes that a vendor can ask any price which it would be reasonable to expect the purchaser to pay. This price would usually exceed the price fixed by a controller; for there would be no necessity to fix prices if they were intended to represent market prices. It would be unreasonable to impute to a vendor a willingness to sell his property at the controlled price to a purchaser who was likely, if he held the land until controls were abolished, to be able to sell the land at an enhanced price. An owner, though otherwise willing to sell, would himself prefer to wait, if guided by ordinary prudence, in the hope that the regulation of land sales requiring the consent of the controller would terminate."

After observing that once the notion is introduced of an external authority forbidding the parties or one of them to offer or give such sum as they please the permitted figure ceases to evidence the value contained in the land to the owner and

¹ 87 C.L.R. 159.³ 87 C.L.R. 170.² (1907) 5 C.L.R. 418.

becomes no more than an expression of Government economic policy, the judgment proceeds to point out that it would not, however, be right to disregard the existence of the controls as a factor to be taken into consideration as affecting the buyer who would himself be precluded from re-selling above the controlled price. After referring to the question of principle upon which the opinion of the court was sought the court said⁴: "On this question we have no doubt that under the Lands Acquisition Act, in estimating the value of land to an owner dispossessed during controls, the valuer should estimate the price which a vendor willing but not anxious to sell would agree to, if he were allowed, and a willing purchaser would give to obtain the land, although in his turn he would be subject to the controls in re-selling."

Their Lordships can find nothing to question in this approach to a novel situation created by the existence of emergency legislation of a temporary nature rendering wholly inappropriate the time-honoured test of market value at a particular date in terms of a willing seller and a willing buyer without further qualification. It must not be forgotten that it is the value of the land to the owner that has to be ascertained, and that the willing seller and purchaser is merely a useful and conventional method of arriving at a basic figure to which must be added in appropriate cases further sums for disturbance, severance, special value to the owner and the like. Furthermore, when the subject-matter of control is the sale of land suitable for development and the control is of a temporary nature and may reasonably be expected to be lifted in the near future—at the date of resumption hostilities had ceased for over a year—circumstances are present which permit of differentiation of a case such as this from others involving consumable goods or goods which would ordinarily be suitable for immediate sale. Whatever formula is adopted it must be one which gives effect in such cases as the present to the element of value to the owner in being deprived of his right to retain his property with a view to sale in the future at a date which may reasonably be expected to be not far distant at a price which will almost certainly exceed the present controlled price.

In so far as *Arklay's* case⁵ so decided their Lordships respectfully concur in the decision of the High Court and consider it equally applicable to the present case, and accordingly answer

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⁴ 87 C.L.R. 159, 173.⁵ 87 C.L.R. 159.

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question (1) (a) of the questions submitted, which are shortly to be set out in full, "Yes," and the question (1) (b) "No."

It appears, however, that what has been referred to as "the principle in *Arklay's* case⁵" was considered by Sugerman J. to extend to approval by the High Court of every step taken by Webb J., the trial judge, in arriving at his decisions in that case, including the admission of evidence of post-control sales.

Their Lordships do not consider that the judgment of the High Court can properly be so construed. The actual decision dealt only with the specific question referred to above. It is true that the court stated that they were unable to find that Webb J. had acted on any wrong principle, but the only wrong principle which had been suggested was his refusal to take the control price as decisive, and no question of the admissibility of evidence was argued. It would not therefore be right to use the case as forming a model necessarily to be adopted in all future cases or as decisive of any matter which was not in issue.

Their Lordships accordingly approach the remaining questions submitted to the Supreme Court as being in no way affected by the decision in *Arklay*.⁵ In this connexion it may be convenient at this stage to set out in full the questions asked in the case stated. They are as follows:—" (1) Was the measure of the compensation to which the plaintiff was entitled in respect of the resumption of the subject land: (a) the price which a vendor willing but not anxious to sell would agree to, if he were allowed, and a willing purchaser would give to obtain the land, although in his turn he would be subject to the control of land sales in re-selling, that is to say, the measure which I adopted following *The Commonwealth v. Arklay*⁵; or (b) the price which the Treasurer or his delegate would have approved under the National Security (Economic Organization) Regulations on a sale of the subject land on the date of resumption subject to the control of land sales then in force under the said regulations? (2) If the answer is 'Yes' to (1) (a), was the method pursued in order to ascertain the said price of following the method adopted by the learned trial judge in *The Commonwealth v. Arklay*⁵ with modifications necessary to apply it to the circumstances of this case, as more fully detailed in my reasons for judgment hereinbefore referred to, a proper method in law? (3) If the answer is 'Yes' to (1) (a), was the evidence

⁵ 87 C.L.R. 159.

“referred to under the several heads in para. 12 of this Case, or
“under any, and if so which, of these heads, admissible?”

Paragraph 12 of the Case is as follows:—“As relevant to the
“determination of the amount of compensation on that footing,
“adopting for that purpose the method of determination adopted
“by the learned trial judge in *The Commonwealth v. Arklay*⁵
“with the modifications necessary for its application to the cir-
“cumstances of the present case, I admitted evidence of the
“following matters, subject, however, to the limitations and
“qualifications indicated in my reasons for judgment (hereinafter
“referred to) as to the legitimate purposes, effect and use of such
“evidence:—(A) Evidence of prices obtained on sales effected,
“after the termination of land sales control, of individual resi-
“dential lots situated in the neighbourhood of the subject land
“and comparable to those into which it would be subdivided on
“a proper mode of subdivision, to the extent that such evidence
“was a guide to the price which might be expected to be obtained
“for residential lots in a subdivision of the subject land if sold
“shortly after the termination of land sales control, that is to
“say, on or about December 31, 1948, or at or about the expira-
“tion of a period of six months from such termination. (B)
“Evidence of the estimated cost, as at or about the periods
“mentioned in (A) above, of road construction, and drainage and
“other works, necessary for the development of the subject land
“in subdivision. (C) Evidence of the opinions of expert valuers,
“founded upon, inter alia, the materials mentioned in (A) and
“(B) above, as to what price the subject land might be expected
“to have realized if sold in globo at or about the times mentioned
“in (A) above.”

Dealing first with question (3), and leaving question (2) for
later consideration, it is clear from the judgment of Sugerman J.
that the evidence admitted under (A), (B) and (C) of para. 12 of
the Case was only admitted for the purpose for establishing one
step in the process of ascertaining the sum which might be
expected to have been obtained for the land if sold in globo at the
date of resumption on the hypothesis that vendor and purchaser
were then free to agree any price they liked free from all control,
so far as that particular transaction was concerned, but with
knowledge on the part of the purchaser that any resale by him so
long as land sales control continued would be subject thereto. The
question therefore becomes one of relevance. There could be no
evidence as at the date of resumption of sales comparable to the

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hypothetical sale to be envisaged and consequently no evidence of the extent of demand or the prices which might be offered by purchasers. If evidence is available of prices obtained on the lifting of controls shortly after the date of resumption it will be relevant as giving some indication of the volume of demand and level of prices which might be expected to have existed at the date of resumption. The larger the interval between resumption and lifting of control the less cogent the evidence becomes, and it must be a question of degree in every case to say at what stage it is inadmissible as wholly irrelevant. In the present case the interval was two years, but having regard to the fact that hostilities had ceased at the date of resumption their Lordships do not consider that the conditions prevailing at the date when control ceased were so different from those which must be deemed to have existed at the time of the hypothetical sale assumed in the *Arklay* formula as to render the evidence inadmissible as irrelevant. It is, of course, true that any figure so obtained will require to be discounted by the circumstance that the hypothetical purchaser will be prevented from reselling above the control price if he should be minded so to do during the continuance of control. On the other hand, there was the reasonable prospect that by the time he had developed the land for subdivisational sales the control would have been lifted. The judgment of Sugerman J. shows that he gave full weight to such considerations in arriving at his final figure. Considering it therefore impossible to hold as a matter of law that such evidence was inadmissible, and seeing no reason in the circumstances of this case to draw any distinction between the evidence referred to in (A), (B) or (C) of paragraph 12 of the Case, their Lordships answer question (3) "Yes."

Returning to question (2). In so far as this question has already been answered under (1) and (3) the answer is "Yes," but if it is intended to go further and to invite express approval for every step in the judgment in the present case or for the precise method adopted at every stage by the trial judge in *Arklay's* case⁵ their Lordships consider it is unnecessarily and undesirably wide and would not be disposed to answer it.

In the result their Lordships agree with the answers given by the Supreme Court of New South Wales to the questions set out in the case stated by Sugerman J., subject to the above qualification with regard to the answer to question (2).

⁵ 87 C.L.R. 159.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondents' costs of the appeal.

Solicitors: *Light & Fulton; Birkbeck, Julius, Coburn & Broad.*

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AND

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Mar. 15, 16,
17, 18, 22,
23, 24;
Apr. 1;
May 4.

Banking—Current account—War—Outbreak—Enemy customer—Unjust enrichment—Whether contract abrogated—Whether obligation to repay implied by law.

Trading with the Enemy. Restitution—Unjust enrichment.

In 1939 the appellant bank, having its registered office in Jerusalem, entered into a contract of current account with the Jerusalem branch of the respondent bank, which had its registered office in England. Palestine was British mandated territory until the mandate expired at midnight on May 14, 1948, and simultaneously with the termination of the mandate the Provisional Council of State and Provisional Government of the State of Israel were constituted. Immediately the mandate ended war broke out between Israel and the Arab States and, by reason of hostilities in Jerusalem, further performance of the contract became impossible. The respondent bank's branch had closed on the previous day and did not reopen until July, 1948. From the date of the termination of the mandate the appellant bank's premises were situated in Arab-controlled territory and the respondent bank's premises in Israeli territory. In October, 1950, the appellant bank sued the respondent bank for repayment of the amount standing to its credit as money had and received to its use, on the ground that the contract had been frustrated by the outbreak of war. The respondent bank had paid the amount of the credit balance to the Custodian of the Property of Absentees appointed under the legislation of the State of Israel:—

Held, that the right to be paid the credit balance survived the outbreak of war, remaining in existence subject to the suspension of the appellant bank's right to recover it. Being locally situate in Israel, it became subject to the legislation of that State and vested

* *Present*: LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER, LORD ASQUITH OF BISHOPSTONE, and LORD COHEN.

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in the custodian, and was not recoverable by the appellant bank from the respondent bank.

Joachimson v. Swiss Bank Corporation [1921] 3 K.B. 110; 37 T.L.R. 534, and *Ertel Bieber & Co. v. Rio Tinto Co. Ltd.* [1918] A.C. 260; 34 T.L.R. 208 considered.

Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag [1946] A.C. 219; 62 T.L.R. 122; [1946] 1 All E.R. 36 applied.

Decision of the Court of Appeal [1953] 2 Q.B. 527; [1953] 2 All E.R. 263 affirmed.

APPEAL from the Court of Appeal (Singleton, Jenkins and Morris L.JJ.).

This was an appeal from an order of the Court of Appeal dated May 21, 1953, dismissing an appeal from, and affirming a judgment of, Parker J. dated November 11, 1952, whereby, after trial without a jury of an action in which the appellants, Arab Bank Ltd., were plaintiffs and the respondents, Barclays Bank (Dominion, Colonial and Overseas), were defendants, he gave judgment for the respondents and dismissed the appellants' claim with costs.

The facts were stated by Lord Morton of Henryton as follows: The appellants sought to be paid by the respondents a sum of £582,931 3s. Od., being the equivalent in sterling of 582,931.146 Palestine pounds. The latter sum was standing to the credit of the appellants on May 14, 1948, in their current account at the respondents' branch at Allenby Square, Jerusalem. The British mandate over Palestine ended at midnight on May 14-15, 1948. Immediately on the determination of the mandate, by a Declaration of Independence and a proclamation made thereunder, the provisional Council of State and the provisional Government of the State of Israel were constituted and, although there was no formal declaration of war, war in fact broke out at once between the State of Israel on the one hand and the Arabs in Palestine and certain States which supported them on the other hand, including the Hashemite Kingdom. By legislation described hereafter, the State of Israel vested in an official called "the Custodian of the Property of Absentees" the property in the State of Israel of "absentees," which term included, in general, any person owning property in Israel who, on or after November 29, 1947, had gone outside Israel. It was not at this stage disputed that the appellants were absentees within the meaning of that term as used in the legislation just mentioned. On February 8, 1951, in response to a request by the custodian to deliver to him all the moneys which they held in the account of the appellants, the respondents

paid to the custodian the sum of 582,931·146 Palestine pounds and now said that they were not liable to pay either that sum or its equivalent in sterling to the appellants. The claim of the appellants was rejected by Parker J. and by the Court of Appeal.

The facts leading up to the appellants' claim were as follows :—

The appellants were incorporated in Palestine in May, 1930, and their registered office was in Jerusalem. From 1937 onwards their registered office and head office was a building called the Anaboussie Building, just outside the Old City of Jerusalem close to the Jaffa Gate. They had a number of branches within and without Palestine.

The respondents were an English company with their registered office and principal place of business in England. They had a local head office in Jerusalem, and a branch at Allenby Square, Jerusalem, which was only a short distance from the Anaboussie Building.

On February 14, 1939, the appellants opened a current account with the respondents at the Allenby Square branch. By the documents under which that account was opened the appellants submitted themselves irrevocably to the jurisdiction of the courts at Jerusalem.

Prior to midnight on May 14–15, 1948, Palestine was mandated territory administered by a High Commissioner. The adjoining territory of Transjordan had originally been a British Protectorate, administered by a High Commissioner, but in the year 1946 Transjordan was recognized as an independent State under the rule of King Abdullah. Palestine and Transjordan had the same currency and were treated as a single currency area for the purposes of exchange control.

In January, 1948, His Majesty's Government announced that the mandate would end at midnight on May 14–15, and from the time of that announcement until the end of the mandate, disturbances which had already begun rapidly increased. By February 27, 1948, conditions had deteriorated, and the respondents made arrangements for the removal of their local head office in Jerusalem to Cyprus. By April 28, 1948, the position was more acute. Some branches of banks in Palestine had been forced to close for a few days at a time. The Arab population tended to move within the walls of the Old City of Jerusalem or further afield, while the Jews remained outside the Old City. The Allenby Square branch of the respondents' bank was on the edge of the Jewish part, divided from the Arab part of the Old City by a strip of land which ultimately became a no-man's land.

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It became clear to everyone that when the mandate ended active hostilities would break out and that the Allenby Square branch might be in the area of the fighting.

On May 13, 1948, the respondents closed their Allenby Square branch, and on the morning of May 14, that is to say before the mandate ended, it was occupied by certain irregular Jewish forces. On the afternoon of May 15 the building was taken over by the regular Israeli forces. Thereafter the building remained at all times under the control of Israel, and the branch was not reopened until July, 1950.

The appellants' head office, which had been at the Anaboussie Building, was moved to the Morcos Building within the walls of the Old City before the termination of the mandate; it was closed for about 15 days and thereafter continued to function until June 1, 1948, when it moved to Amman, and the appellants became registered in Amman on November 7, 1949. From the end of the mandate the appellants had no branch operating or in existence in Israeli territory.

The events which took place on the determination of the mandate have already been stated. A state of war still existed at all material times, though there was, on two occasions, a cease-fire, and on April 3, 1949, an armistice was signed. The appellants' office in the Morcos Building was on the Arab side of the no-man's land dividing the Israeli and Arab occupied territory under the terms of the armistice, while the respondents' Allenby Square branch was on the Israeli side.

On April 27, 1950, *de jure* recognition was accorded by His Majesty's Government to Israel, but a reservation was made in that no more than *de facto* recognition was accorded in respect of Israeli sovereignty over that part of Jerusalem occupied by Israel. In April, 1951, His Majesty's Government accorded *de jure* recognition to the Hashemite Kingdom of Jordan which included that part of Palestine occupied and controlled by the Arabs, but His Majesty's Government made a similar reservation in respect of that part of Jerusalem occupied and controlled by the Arabs.

Meanwhile, the State of Israel had passed certain legislation, already briefly referred to. On May 19 it passed a Law and Administration Ordinance, No. 1 of 5708 (1948), having effect from May 14, 1948. By article 11 of that Ordinance, it was provided that the law which existed in Palestine on May 14, 1948, should remain in force, in so far as there was nothing therein repugnant to the Ordinance or to other laws which might

be enacted by the State. Since the law which existed in Palestine on May 14, 1948, embraced the common law of England in regard to trading or communicating with the enemy, it became illegal for anyone in Israel to have intercourse with anyone in enemy territory. Further, by that Ordinance the Defence (Finance) Regulations in force in Palestine were continued, subject to the provisions that the power of the High Commissioner thereunder was vested in the Provisional Government and the word "Israel" was substituted for "Palestine," wherever it appeared in those regulations. By regulation 40 of the Defence (Finance) Regulations, 1941, as amended, which were in force in Palestine prior to the cessation of the mandate, it was provided as follows: "Subject to any exemptions which may be granted by "order of the High Commissioner, no person shall, except with "permission granted by, or on behalf of the High Commissioner "(a) draw, issue or negotiate any bill of exchange or promissory "note, acknowledge any debt, or make any payment, so that a "right (whether actual or contingent) to receive a payment is "created or transferred in favour of a person who is resident "outside Palestine and Transjordan; or (b) make any payment to, "or place any sum to the credit of, any such person."

As a result of the Ordinance, therefore, it became unlawful, except with the permission of the Israeli Government, for anyone in Israel to make a payment to a person resident outside Palestine unless that person was resident in Transjordan. The omission to delete the reference to Transjordan was rectified by a regulation, published on July 14, 1948, and having retrospective effect to July 4, 1948, by which the word Transjordan was deleted from regulation 40.

By further regulations published on December 12, 1948, and entitled "Emergency Regulations on the Property of Absentees," the property of absentees was vested in a custodian. Under the regulations property was defined as meaning movable or immovable property, funds, a right in property, express or implied, and a trade name. There was an elaborate definition of "absentee," which included in general any person who owned property in Israel, and who, on or after November 29, 1947, had gone outside Israel. By regulation 5, every property of an absentee was vested in a Custodian of the Property of Absentees from the day of the publication of his appointment. By regulation 7 it was provided that where such property was in the form of a debt, or an indebtedness due to the absentee, the person indebted should pay the sum to the custodian. By regulation 38, contravention of the

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regulations was made an offence. Parker J. found that the appellants were "absentees" within the meaning of the Israeli legislation relating to the property of absentees and that finding was not now disputed by the appellants.

After the termination of the mandate correspondence passed between the appellants and the respondents' local head office in Cyprus in which the appellants claimed payment of their balance from the Allenby Square account by its transfer to their account with the Midland Bank Ltd. in London. The respondents refused to make the transfer on the grounds set out in a letter dated November 24, 1948, from their general manager to the appellants' general manager in the following terms: "An account at our Allenby Square branch constituted a debt from our Allenby Square branch which is legally payable only at or by transfer from that branch. The Jewish [sic] authorities who are in de facto control of the area in which our branch is situated will not permit transfer or payment of balances outside territory occupied by them, without their proper authority. Being therefore constrained by reason of force majeure we are unable without such prior authority to pay your balance as requested by you." An offer was made to approach the Israeli authorities, but nothing came of that and the writ herein was issued on October 9, 1950. As already stated, on February 8, 1951, the respondents paid to the custodian the balance amounting to £P582,931.146.

Sir Andrew Clark Q.C., Maurice Lyell and Jamal Nasir for the appellant bank. In the court of first instance the claim was on two main alternative grounds. The first was that before the end of the mandate the appellants had demanded payment of the balance standing to the credit of their current account and the respondents had refused or failed to pay; there was a claim for damages for breach of contract. Parker J. decided against the appellants on the facts and this claim is not now material. On the second ground they claimed that the contract of banker and customer on current account was frustrated on May 15, 1948, by the outbreak of war, and that by operation of law the respondents became liable to repay to the appellants the amount of the credit balance as money had and received. This debt was a chose in action situate at the respondents' residence in London; therefore it was unaffected by future events in Palestine and was payable and recoverable in London. It is common ground that for this purpose the law both of Israel and Palestine is the same as the law

of England. If there is a debt which can survive frustration of the contract of current account it is a simple debt shorn of all the incidents of the frustrated contract, e.g., the necessity to make demand before payment and the limitation of the duty to pay to the Allenby Square branch. It is admitted that, on this contention, a debtor who had no money in England because the law of Israel prevented him from removing it from there, could be made bankrupt here. This was a simple debt and the position was exactly the same whether the debt survived or the law imposed an obligation to repay as money had and received. In either case, there was an obligation to seek out the creditor and pay him wherever he might be found. Therefore, there was nothing which could legally be vested in the custodian in Palestine and the respondents wrongly paid it to him.

There is no such thing as a right to demand payment. There is a right to payment and the necessity for demand under the contract was a fetter on the payment. If the necessity to make a demand disappeared, equally the limitation on the place of payment disappeared, because both were part of the frustrated contract. The whole crux of the question is: Where, after the frustration of the contract, was the debt situate and what was the nature of the debt? If it remained situate at the Allenby Square branch the appeal must fail.

There is a great deal of authority for saying that where performance of a contract becomes illegal by reason of the outbreak of war it must be frustrated, because war is of indefinite duration, and there is no choice between suspension and frustration. A contract cannot be suspended when it becomes illegal. Here the contract was frustrated before the closing down of the Allenby Square branch could have any effect. The moment the mandate ended the contract was frustrated, so that it does not matter whether or not there was a breach by shutting down the branch; there was at the material time no contract, so there could be no breach.

The contract between a banker and a customer on current account is fundamentally a contract for the loan of money, but for a loan on which are engrafted special terms. Many of the special terms are not expressly agreed, but arise by implication from the nature of the business of bankers. The current account customer agrees to lend his money to the banker, generally, and in this case, at no interest, in consideration of the banker undertaking to perform "banking services." These include (inter alia) the banker's undertaking to receive from time to time, during

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banking hours, such money as the customer elects to pay him, to collect bills for the customer's account, from time to time, as and when required during banking hours, to repay any part of the amount due on demand or against the written order of the customer addressed to the banker, to keep proper accounts and supply the customer with copies thereof on demand, and to preserve and return to the customer all paid cheques. No obligation to repay moneys received on account of the customer arises until a demand for repayment is made by the customer, and where the banker carries on business at more than one place, the obligation to repay is limited to repayment at the office where the account of the customer is kept, on demand being made at that office during banking hours or in accordance with written orders addressed to the banker at that office. This limitation on the banker's obligation to repay is necessary to enable the banker to perform the obligations which he undertakes in return for the loan of the customer's money. There is also an obligation on the banker not to cease to do business with the customer except on reasonable notice. This limitation is necessary to safeguard payment of outstanding cheques. The obligation to repay is an obligation of the banker and not of the branch; but so long as the banker is able and willing to provide the banking services which are the consideration for the retention and use of the customer's money, the obligation to repay is localized at the branch where the account is kept.

If the banker becomes unable or unwilling any longer to provide such banking services, then his right to retain the amount of any balance standing to the credit of the customer is determined and there arises, either by operation of law or as an obligation inherent in the original loan, an obligation to seek out the customer and repay the amount of the balance to him.

There is an obligation to repay arising from the fact that the money was advanced by way of loan, but the contract of current account restricts the obligation to pay. As long as the contract subsists the money is only repayable in accordance with its terms, but the moment the contract goes it becomes repayable as money had and received.

It makes no difference that the Allenby Square branch was reopened before the issue of the writ in this action, because if the contract was frustrated it could never come into being again.

The bulk of the submissions made as to banking law are from Atkin L.J. in *Joachimson v. Swiss Bank Corporation*.¹

¹ [1921] 3 K.B. 110; 37 T.L.R. 534.

The right claimed is to a liquidated sum shorn of the trappings of the contract of current account—the necessity for demand and the limitation as to place of payment—and it is of purely academic interest whether it is the original debt that remains or a new obligation imposed by law.

These obligations on the customer cannot remain, because otherwise the contract though frustrated in part would continue in part, in that while these obligations on the customer remained the bank would be absolved from all its obligations under the contract, which constituted the consideration for the restrictions on the customer's rights.

The first question is as to the nature of a current account. Once moneys are paid to its credit, the contract operates to create the relationship of debtor and creditor between banker and customer in respect of the balance from time to time standing to the credit, or possibly, the debit, of the account. The terms which the law implies are (1) that the debt is not to be payable until a demand has been made by the customer; (2) that the demand must be made at the branch where the account is kept, and (3) that the amount in respect of which the demand is made then becomes immediately payable at, or by transfer from, the branch. But for these terms, the moment the customer deposited his money, it would become the banker's duty to seek him out and pay him back, but the courts have held that that would frustrate the business of banking. If the banker is not able or willing to pay at the branch, there is a right to sue him, wherever he may be. If a banker notified his customer that he was closing his current account in a week, there would be no need for the customer to demand payment of the balance; it would be the banker's duty to pay him. When a banker is unable or unwilling to pay at the branch where the debt is localized, it ceases to be so localized, because the banker has failed to perform his part of the contract. It then becomes a simple debt localized at the banker's head office or principal place of business. If demand for payment is made at a branch before the outbreak of war, but there is refusal or inability to pay then and war breaks out before payment is made, that gives rise to an action for breach of contract. For the present purposes the distinction between suing in an action for debt or in assumpsit does not matter.

The relevant authorities on this branch of the case are *Joachimson v. Swiss Bank Corporation* ²; *Bagley v. Winsome and National*

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² [1921] 3 K.B. 110.

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The second question is as to the effect of war on contracts generally and current accounts in particular. From the outbreak of war any communication between the appellants and the Allenby Square branch would have been illegal. It would have been illegal to make any demand for payment and any payment would have been illegal. The effect of frustration so far as the future was concerned was that the contract was wholly abrogated and at an end; as from that date the whole contract was gone. If there was frustration then every term of the contract had gone for the future. But the rights which had accrued at the date of frustration were not forfeited. Those rights required nothing further to be done under the contract but payment of a liquidated sum. After the contract was gone there remained only accrued rights or rights of property and rights concomitant to rights of property. It is only in the belligerent country that the right of action is suspended; rights outside the belligerent country are unaffected.

The relevant authorities on this branch of the case are *Ertel Bieber & Co. v. Rio Tinto Co. Ltd.*⁸; *Willison v. Patteson*⁹; *Robson v. Premier Oil and Pipe Line Co. Ltd.*¹⁰; *In re Anglo-International Bank Ltd.*¹¹; *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag*¹² and *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.*¹³

The third question is whether, assuming that the contract was frustrated, there was anything or there was nothing which could survive and, if the former, what survived.

At the date when this contract was frustrated it remained executory on both sides, because there were obligations subsisting to be performed. Under the contract there was no right to payment until a demand was made. It became illegal to make a demand and, because a demand was a condition precedent to any

³ [1952] 2 Q.B. 236, 238, 240-1, 244, 245; [1952] 1 All E.R. 637.

⁴ [1915] 2 K.B. 576, 578; 31 T.L.R. 278.

⁵ [1912] A.C. 212, 218-20; 28 T.L.R. 41.

⁶ (1914) 31 T.L.R. 83.

⁷ [1927] P. 228, 231, 232-3; 43 T.L.R. 631.

⁸ [1918] A.C. 260, 267-71, 274-5, 276-7, 283-4, 284-9; 34 T.L.R. 208.

⁹ (1817) 7 Taunt. 439.

¹⁰ [1915] 2 Ch. 124; 31 T.L.R. 420.

¹¹ [1943] Ch. 233, 236-40; 59 T.L.R. 312; [1943] 2 All E.R. 88.

¹² [1946] A.C. 219, 224, 228, 234-42, 248-53, 253-4, 257-8, 258-9, 262-7, 267, 269-70; 62 T.L.R. 122; [1946] 1 All E.R. 36.

¹³ [1942] A.C. 154, 163; 57 T.L.R. 485; [1941] 2 All E.R. 165.

right of payment, the case was distinguishable from that of a debt payable by future instalments. The whole basis of the decision of the majority in *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag*¹⁴ was that the contract was wholly executed on one side, that there was an accrued right to payment and that nothing further remained to be done but to receive payment.

In the present case the obligation to repay did not arise out of the contract. It arose because there was never any intention that in the circumstances the respondents should retain for their own benefit the moneys lent to them. This is founded on the principle that English courts will not allow persons resident in their jurisdiction to act unconscionably. The head office of the respondent bank is here and has received the money here, because the receipt is by the bank and not the branch, and therefore the courts would order repayment.

One looks at the law of Israel to see whether the contract is frustrated. Once it is frustrated it has gone and English law says that in the circumstances an English company, resident within the jurisdiction, has obtained money which it would be unconscionable to allow it to retain and, therefore, the courts, acting in personam against the company, order it to refund the money. That does not depend on the contract. The respondents were enriched in England and were in England at the time of the enrichment. For them to retain the money would be unjust enrichment.

The contract being frustrated the money is not repayable in Israel because, in the absence of contractual terms, an obligation to pay money is a chose in action situate where the debtor resides. If the Allenby Square branch had been a subsidiary company, a legal entity on its own, this case might never have arisen. Even if the obligation to repay were imposed by the law of Israel, and not the law of England, the obligation to repay would rest, not on the branch, but on the company resident in London.

The relevant authorities on this part of the case are *Royal Bank of Canada v. Rex*¹⁵; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*¹⁶

The contract was frustrated; there was no accrued debt which could survive; there never was any intention that the respondents should retain the money advanced to them by way of loan; the

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29 T.L.R. 239.¹⁶ [1943] A.C. 32, 40-4, 46-50,
55-6, 61-6, 69-71, 73, 76-8, 83-4; 38
T.L.R. 308; [1942] 2 All E.R. 123.

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consideration for the continued retention of money which would otherwise have had to be repaid was a consideration from day to day, and so far as the balance standing to the credit of the current account on May 14, 1948, was concerned the consideration for its continued retention wholly failed on May 15. Alternatively, if there was no accrued obligation in the nature of a debt which could survive after frustration, there must have been something in the nature of an inherent right to repayment arising by reason of the payment in the first instance of money on loan, a right arising, not out of contract but out of the initial loan.

The right to demand payment is a right to demand it in that way which is the provision of banking services, and it is that very right which is frustrated by war. If the obligation and right did survive, the moment the war was over the relation of banker and customer would be found still existing. That would be doing what the authorities say cannot be done, leaving a contractual relation in suspense throughout the war.

It is irrelevant that the respondents have paid the full amount to the custodian. They paid it under a mistake to the wrong person.

On the fourth question, as to the location of a simple debt, any enforceable right against a debtor, being a personal right, is situate where he resides, whether the action be in debt or sounds in damages. In the case of a company that is where it has its head office or principal place of business. If it has several places of business, its residence for this purpose is where it has its administrative centre. A debt cannot be situate simultaneously in more than one place. It is admitted that there may be two places of residence for tax purposes, because that turns on the taxing Acts, but, even on those Acts, the respondent bank was never at any material time resident in Israel. The location of documents of title evidencing the debt does not affect the location of the debt.

The relevant authorities are *English, Scottish and Australian Bank Ltd. v. Inland Revenue Commissioners*¹⁷; *Union Corporation Ltd. v. Inland Revenue Commissioners*¹⁸; *New York Life*

¹⁷ [1932] A.C. 238, 242-3, 246, 247-9, 252-3, 256-7; 48 T.L.R. 170.

¹⁸ [1951] 2 T.L.R. 582, 584, 586; (C.A.) [1952] 1 T.L.R. 651, 653, 659-

62; [1952] 1 All E.R. 646; (H.L.)

[1953] A.C. 482; [1953] 1 All E.R. 729.

*Insurance Co. v. Public Trustee*¹⁹ and *Sutherland v. Administrator of German Property*.²⁰

*Walker v. Bradford Old Bank Ltd.*²¹ was a very peculiar case because, although the assignor purported to assign the moneys standing to his credit at the bank during his lifetime, he retained the right to draw cheques and operated the account the whole time. It was merely an assignment of the balance at the date of his death. That authority does not help in the present case at all. It was a long time before *Joachimson v. Swiss Bank Corporation*,²² and in so far as it suggests that a balance on current account is assignable it is wrong, for that is inconsistent with that later authority. If it was merely an assignment of the balance at the date of death that is consistent. The current account then comes to an end and there is a definite sum of money owing. No demand is necessary at the date of death. In *Joachimson's* case²² it was never decided whether a writ is sufficient without a preceding demand. It is submitted that it is not.

If this had been the case of an Israeli bank and not an English bank the new obligation on frustration of the contract would have been suspended. It was not suspended in this case because it was an English and therefore a neutral bank. When a debt is created its location is governed, not by the law which created it, but by the residence of the debtor, unless the contract provides that it is to be located at some place other than his residence.

The questions to be answered in this case may be summed up: Was there any accrued right which survived the frustration of the contract? If no right survived frustration, are the appellants entitled to recover the moneys which they had loaned to the respondents as moneys had and received? If so, is the right to recover those moneys situate in Israel? If they are not situate in Israel and there is such a right the appeal must succeed. If there is such a right and it is situate in Israel the appeal must fail.

Sir Hartley Shawcross Q.C., Rodger Winn and Ian Warren for the respondent bank. The contract of current account is one which from the time of Lord Mansfield has always been considered to be basically that of a local debtor and creditor, one which is brought to an end by operation of law and not on the

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¹⁹ [1924] 1 Ch. 15, 26-7; 39 T.L.R. 720; (C.A.) [1924] 2 Ch. 101, 106-7, 110, 111-2, 115, 119-22; 40 T.L.R. 430.

²⁰ [1934] 1 K.B. 423, 430-2, 433, 433-4; 50 T.L.R. 107.

²¹ (1884) 12 Q.B.D. 511-3, 515-7.

²² [1921] 3 K.B. 110.

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doctrine of any implied term; because of its inherent nature as a personal contract it is brought to an end in various events, viz., death, bankruptcy, lunacy and illegality (e.g., war). When it ends the personal representative of the customer is entitled on appropriate proof of title (e.g., local probate) to the outstanding balance, still treated as lying at the branch where the whole transaction from its inception arose. During the subsistence of the contract the customer's right is to payment of his money subject to a demand, a restriction on the right inherent in the nature of the original debt. As to the question of assignment, *Walker v. Bradford Old Bank Ltd.*²³ was cited in *Joachimson v. Swiss Bank Corporation*²⁴ and no one disapproved of it. If a document says "I hereby assign to John Smith the balance "outstanding on my account," that is in effect a demand and creates a right in the assignee without notice to the bank.

There has never been an attempt to produce what would be a revolutionary change in the whole practice of international banking with great repercussions on international insurance, by such points of nicety and fine distinction as it has been sought to make in this case. The appellants have assumed that no question of conflict of laws is involved and that whatever law is applied is the same as the English common law.

Suppose that at the London branch of a United States bank a German had in about 1930 opened an account and agreed irrevocably to submit himself to the jurisdiction of the English courts, and that he paid in drafts and cheques and handed over securities, receiving banking services. By September 2, 1939, a current account of £500,000 was built up, being a sterling balance in London, since the German did not want to be paid in marks in Germany or in dollars in the United States. The whole purpose of the transaction was to have sterling in London. The customer's basic right was to demand payment of the whole amount. It was a matter of added convenience that he could demand a part, but suspension of the whole debt on the outbreak of war between England and Germany on September 3, 1939, would not involve rewriting the whole contract because of the obligation to pay parts, if only parts were demanded. The basic obligation was to pay the whole, and if that survived there was no rewriting of the contract. The customer's right to ask for payment of the balance and instantly to be paid it is an undoubted right of property. That right is none the less an accrued right or chose

²³ 12 Q.B.D. 511.²⁴ [1921] 3 K.B. 110.

in action because there is not yet any right of action and before the customer can sue he must do some unilateral act wholly dependent on the exercise of his own will or perhaps effluxion of time. In the illustration suggested it was not the need to demand the money at the particular branch which localized the debt there. The very purpose of the relationship was that the money should be provided in sterling there. The demand was only part of the machinery for securing the discharge of the debt: see *Joachimson v. Swiss Bank Corporation*.²⁵ It is a concomitant of a right of property, the incidental and necessary result of the whole basis of the banking transaction itself. Rights of property and concomitant rights are not in fact destroyed as the appellants suggest. The view expressed by Lord Russell of Killowen in *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag*²⁶ that the general principle that rights of property are not destroyed is limited to real property is incorrect.

As to the position after the outbreak of war in the case of the illustration suggested, one cannot sever the so-called superadded requirements of the contract from the simple debt arising on the contract, and the nature of the contract here negatives any duty on the part of the debtor to seek out his creditor and pay him. Nor is this an action for money had and received on a consideration which has wholly failed, for the consideration has not wholly failed, since the bank has rendered banking services. To say that a new consideration is required every moment for the retention by the bank of the money is wholly artificial. As to unjust enrichment, that doctrine is probably not part of the law of England and, further, it cannot be unjust for a man to retain money if, by the law of the place where he obtained it, he would be imprisoned if he paid it back. Even if in some cases the action for money had and received might lie, the law never imposed such an obligation where, as here, the transaction is already governed by a consensual arrangement, express or implied. Such an obligation would provide a very useful means of getting a horse and cart full of bullion across the borders of exchange control. Before one can investigate the question of the situation of the debt one must see what the obligation is, and the obligation must be created, if at all, by the proper law of the place of the transaction out of which it arises. Not only the question whether a contract is frustrated but also the question what are the consequences and obligations, if any, arising from the frustration, are

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²⁵ [1921] 3 K.B. 110, 129-30.²⁶ [1946] A.C. 219.

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settled by the proper law of the contract. Of course, in the case of a contract frustrated by the *lex loci solutionis* the consequences would be governed by the proper law of the contract. In the case of the illustration an express contract, stated to be irrevocably governed by English law, would be held contrary to public policy if it said: "Should you become an enemy and we are forbidden by English law to enrich you in sterling we will enrich you in dollars." In the present case the law of Israel said that the debt was situate in Israel, that it was vested in the custodian and that to pay it to anyone else was a criminal offence. If such matters as this were governed by the law of residence, the question would arise whether it was the residence at the time of the original contract or at the time of the breach. If the law abolishes the contract, the law which governs the transaction is that of the locality where it took place, the *lex loci actus*.

As to the law of Israel, it would be surprising if, this debt being regarded as a subsisting debt vested in the custodian and one which could not lawfully be paid to the appellants, the respondents, who never claimed the money for themselves and in fact paid it to the custodian, were held to have unjustly enriched themselves, when, if they had paid it to the appellants in London, they would have exposed themselves to penalties in Israel in the same way as persons violating English trading with the enemy legislation. "Unjust enrichment" is the label now given to the old doctrine of *aequum et bonum*. The whole transaction was an Israeli transaction. The Israeli legislature was just as much entitled as was the United Kingdom legislature in 1939 to say that current account debts should be vested in the custodian. In 1939 those current account debts must have been recognized as located in the United Kingdom, for no legislature is entitled to impose on the nationals of another country a debt which they do not owe, and there was no protest on behalf of foreign banks with branches in the United Kingdom. The appellants contend that the chose in action shifted its location and they used the metaphor of a sheep shorn of its wool, but when it got to London it was not a sheep but a goat; instead of Palestine pounds it was sterling, which might be a different thing. In order to find the primary situs of a debt one must look at all the circumstances. The practice of bankers has never been to treat these accounts in the event of war as being shifted from one country to another. In both the world wars it was the practice to treat amounts standing to the credit of enemies on current account as suspended and as consequently capable of vesting in the custodian. That

is not explainable by the form of the legislation because it did not attempt to define the debts as vesting but treated them as if they were merely suspended. To make the matter turn on whether a minute before the outbreak of war a demand was made is astonishing. This case is important on the whole practice of international banking as hitherto understood.

The law relating to frustration cannot reach a high degree of precision, and in this case the appellants are attempting too much to stereotype the doctrine.

The following propositions are submitted :

(1) It is an oversimplification to say that a contract of current account is wholly executory. On a customer entrusting money to a banker to hold on current account the relationship of debtor and creditor is created, the consideration being the banker's undertaking to collect and keep the money and pay it back when asked. There are other added obligations, but that is the basis of the whole thing.

(2) It is erroneous to say that a customer on current account has no accrued rights. He has at least an accrued right to immediate payment on demand or, putting it another way, to demand payment of the balance standing to his credit, and that is a right of property. A banker is by all the authorities treated as a debtor, and he is so none the less because he need not, although he may, pay the debt without demand, the customer's rights being rights of property. These incidents are not only rights of property but they are capable of assignment as such or of being garnisheed or left by will or of devolving on an intestacy.

(3) It is an incident of the contract that the current account can be closed. It is terminated but not in the sense that it is destroyed. Accrued rights remain due under the contract. If the account is closed by death, bankruptcy, lunacy or the act of the parties, the operations on the account cease, a balance must be struck and the credit or debit becomes due on the closed contract of current account at the branch where the account was kept. It is not essential for the respondents' case to say whether a demand is necessary or not.

(4) The true doctrine in regard to the effect of war is not that it abrogates and destroys the contract itself, but that, subject to certain exceptions, it puts an end to all the rights and liabilities under the contract.

(5) In determining the effect of war on a contract the criterion whether the contract is executed or executory is not an absolute one. A contract which is executory as to the future may include

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(6) The true basis of the distinction by which a contract to pay money is said to be only suspended, whereas a contract, for instance, to deliver machinery is called abrogated, does not lie in any question of intercourse with the enemy. It is inaccurate to say that in the case of a contract giving rise to an accrued debt there is nothing more to be done. On the contrary, under such a contract the debtor's normal duty is to seek out his creditor and pay him. The performance of such a contract would involve intercourse with and enrichment of the enemy. The true reason why the obligation is only suspended is that a debt is a right of property and war does not destroy such rights. It is otherwise in the case of a contract to deliver machinery, because in the case of a monetary obligation suspension is commercially practicable, whereas in the case of machinery or something which has to be delivered in the future it is not. If the delivery date is past, however, the claim for damages probably survives and if, under the contract, the property in the machinery has passed, that probably survives.

(7) For present purposes there is no distinction in principle between a balance on current account and a debt payable by future instalments. The performance of the latter during war would be at least as illegal as the making of a demand for payment of the balance of the account. It is not conceded that the making of a demand would be illegal at common law, though it might be under statute. If it were agreed to make payment that would be an offence, but that is a different matter. It is not necessary for the respondents to argue on the illegality of the demand, for if that would be illegal it would be even more illegal to pay the instalments on the instalment contract. But the illegality does not abrogate the instalment contract; the obligation to pay is suspended. If the demand were vital an enemy might get a benefit by having made it if he thereby got an accrued right, but the effect of the demand legally in itself would be suspended.

(8) Incidents attaching to a contract, including the methods and consequences of its discharge, whether by illegality or otherwise, are to be settled by the proper law of the contract, the Palestine-Israel law.

(9) If, contrary to these submissions, the contract and all obligations under it are to be considered as abrogated, it is only because the law of Israel treats its continuance as illegal. It is no part of the law of Israel that a person who is by that law

forbidden to perform a contract for the payment of money to an enemy is simultaneously placed under an obligation to pay the money that was due on the contract as money had and received or on the basis of unjust enrichment. Any such rule would defeat the purpose of the primary rule from which it was said to result and which abrogated a contract in favour of the enemy.

(10) The selection of English law because England is the main residence of the respondents involves a confusion between residences for the purposes of liability to tax and residences for the purposes of suit. The corporation resides for the latter purposes in as many countries as it carries on business in, but, in any event, the country of residence, however ascertained, does not as such govern the incidents of relationships arising between the corporation and third parties in other countries. The situs of a debt depends on the circumstances creating it, and a debt arising on a current account, whether closed or not, is in the country where that account was kept. It is not material to say in what part of a particular country a debt is situated. Thus one does not say that it is situate at No. 10, Bond Street. One says that it is situate within an area which is subject to a particular system of jurisdiction and law. That is the purpose of ascertaining situs.

In summary, war only suspends and does not frustrate an obligation to pay on demand the balance of a current account, but if, contrary to that view, it does frustrate, the credit balance at once becomes money had and received at the branch and payable at the branch, and is a debt locally situate at the branch although, of course, capable of being sued for anywhere where the bank can be found.

Propositions (1), (2) and (3) (*supra*) can be taken together. It is to be noted that *Joachimson v. Swiss Bank Corporation* ²⁷ was not intended to override or qualify decisions in earlier cases. It is not of importance to the respondents' case whether the issue of a writ is equivalent to a demand, though it would be of importance if they had to show an accrued cause of action as opposed to a chose in action or a right of property. This is an accrued debt the moment the balance is struck. It is fluctuating until the account is closed. While the account is running there is an accrued debt in respect of the balance then standing to its credit. It is crystallized at the moment war breaks out. There is a difference between an accrued debt and an accrued debt which can be sued for.

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The relevant authorities on this part of the case are *Foley v. Hill* ²⁸; *Richardson v. Richardson* ²⁹; *Hugh Stevenson & Sons Ltd. v. Aktiengesellschaft für Carton-Industrie* ³⁰; *Rogers v. Whiteley* ³¹; *Plunkett v. Barclays Bank Ltd.* ³²; *Heppenstall v. Jackson* ³³; *Bagley v. Winsome and National Provincial Bank Ltd.* ³⁴ and *In re Westerton*. ³⁵ See also Halsbury's Laws of England, 2nd ed., vol. I, p. 796, para. 1305; pp. 798-9, para. 1309.

Proposition (4) (supra) is that the true doctrine is not that war in any case abrogates and destroys the contract but that it puts an end to further performance, except the right to a liquidated sum of money. The relevant authorities are *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag* ³⁶; *Ottoman Bank v. Jebara* ³⁷ and *Ertel Bieber & Co. v. Rio Tinto Co. Ltd.* ³⁸

Proposition (5) (supra) is that the criterion whether a contract is executory or not is not an absolute one. On that the relevant authorities are *McNair on Legal Effects of War*, 3rd ed., pp. 92-3, 120-1, 264, 266, 269-70; *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag* ³⁹; *Seligman v. Eagle Insurance Co.* ⁴⁰ and *Hugh Stevenson & Sons Ltd. v. Aktiengesellschaft für Carton-Industrie*. ⁴¹

Proposition (6) (supra) is that the rationale of the distinction may lie in property. A debt or a liquidated sum of money payable on demand is property. Therefore it is preserved and the right to sue is merely suspended. Or the real basis may rather be commercial convenience. In the case of a contract to deliver wheat at a future time, it is, as a matter of practice, impossible to suspend that contract or the interests which arise under it. In the case of a contract for the payment of money, also at a future time, it is possible to suspend it. Though money changes in value with the passage of time, the commercial inconvenience is quite different in the two cases. In the case of the wheat it is probably wanted for resale at a particular time and place.

As to proposition (7) (supra), in the case of instalment

²⁸ (1848) 2 H.L.C. 28.

²⁹ [1927] P. 228, 232-3, 234.

³⁰ [1918] A.C. 239; 34 T.L.R. 206.

³¹ [1892] A.C. 118; 8 T.L.R. 418.

³² [1936] 2 K.B. 107, 118-9; 52 T.L.R. 353; [1936] 1 All E.R. 653.

³³ [1939] 1 K.B. 585, 590-2; 55 T.L.R. 489; [1939] 2 All E.R. 10.

³⁴ [1952] 2 Q.B. 236, 240-1, 244-5.

³⁵ [1919] 2 Ch. 104, 109-11.

³⁶ [1946] A.C. 219, 258-9.

³⁷ [1928] A.C. 269, 276; 44 T.L.R. 525.

³⁸ [1918] A.C. 260, 269.

³⁹ [1946] A.C. 219, 240.

⁴⁰ [1917] 1 Ch. 519, 525-6.

⁴¹ [1918] A.C. 239, 245-6, 246-7, 247-8.

payments the contract or its obligation is only suspended: *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag*.⁴² In order to succeed the appellants must show that the right under the contract in the present case is completely destroyed so that there is nothing left to be suspended. The appellants also relied on an alleged dormant obligation which came to life on the frustration of the contract, but to say that the law imputes a basic obligation to pay at a different place than which the parties have expressly contracted should be paid in a particular place in a particular country would be to embody in the consequences of the contractual relationship a result different from that which the parties contracted to bring about. To impute anything of the kind would be to introduce a contradiction into that relationship.

As to proposition (8) (*supra*), that what happens on the frustration of a contract by illegality or otherwise is essentially a matter to be decided by the proper law of the contract itself, the relevant authorities are Dicey's *Conflict of Laws*, 6th ed., pp. 651-2, 754, 755-6; *Fessard v. Mugnier*⁴³; *Ingle v. M'Cutchan*⁴⁴; *Horwood v. Millar's Timber and Trading Co. Ltd.*⁴⁵; *In re Davis & Co.*⁴⁶; *Swiss Bank Corporation v. Böhmsche Industrial Bank*⁴⁷; *Lloyd v. Guibert*⁴⁸; *Antony Gibbs & Sons v. Société Industrielle et Commerciale des Métaux*⁴⁹; *Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft*⁵⁰; *Kahler v. Midland Bank Ltd.*⁵¹

On proposition (9) (*supra*), that neither the proper law of the contract nor the *lex actus*, if that arises, applies the doctrine of unjust enrichment to contracts frustrated by its own prohibition of payment, the following are the relevant authorities: *Sinclair v. Brougham*⁵²; *Boissevain v. Weil*⁵³; *Reading v. Attorney-General*.⁵⁴

As to proposition (10) (*supra*), the situs of a debt is based on jurisdiction. If the court has jurisdiction over the debtor the question where the debt is to be deemed situate is settled by looking at the surrounding circumstances and in particular at

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⁴⁷ [1923] 1 K.B. 673, 676, 678, 681, 682, 684; 39 T.L.R. 179.⁴⁸ (1865) L.R. 1 Q.B. 115, 122-3.⁴⁹ (1890) 25 Q.B.D. 399, 405-6; 6 T.L.R. 393.⁵⁰ [1939] 2 K.B. 678, 693-4; 55 T.L.R. 814; [1939] 3 All E.R. 38.⁵¹ [1950] A.C. 24, 27, 35, 53-4, 56-7; 65 T.L.R. 663; [1949] 2 All E.R. 621.⁵² [1914] A.C. 398, 452; 30 T.L.R. 315.⁵³ [1950] A.C. 327, 341; [1950] 1 T.L.R. 771; [1950] 1 All E.R. 728.⁵⁴ [1951] A.C. 507, 513-4; [1951] 1 T.L.R. 480; [1951] 1 All E.R. 617.

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the contract. Though the respondents could be sued wherever they have a place of business, that leaves open the question: Where is the obligation to be deemed legally situate? The relevant authorities are *Jabbour v. Custodian of Israeli Absentee Property*⁵⁵ and *Sovfracht V/O v. Van Udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)*.⁵⁶

Rodger Winn following. In law a simple debt is one which arises by simple contract and not by specialty. It is not a question of how simple or complex are the terms of the debt obligation; see *Rex v. Williams*.⁵⁷ A debt in the modern juristic conception is a contract to repay the equivalent of a sum of money lent, unless there is a quasi-contract, a quasi-contract really being an obligation assimilated to that of the contract of debt. One can conceive a contract to render services as well as to repay the equivalent of a sum of money lent. A might lend money to B, who by an express obligation undertakes to render him services while the loan is outstanding either for no further remuneration than the advantage of the loan or at a lower rate than he would charge others. If the individual who contracted to render services as well as to repay the loan became incapacitated from further service, the debt would remain unaffected by the personal service contract. The case is analogous to the present, where the respondent bank have agreed to render services as well as to repay the equivalent of the money lent to them. Save for the possibility that a sum of money may have been paid into this account since the last item of banking service was rendered, it is not true to say that any part of the credit balance was one in respect of which no consideration had been rendered. This is not a case of money lent for a consideration which has wholly failed. The contract remains executory in part, but it has been executed in other parts. Any party to a contract who has wholly performed his contractual obligation has gained an accrued right. There is no reason why there should be any property element in a right to be paid money which is not present in a right to receive a certain quantity of wheat. When, however, in any particular case, a right to performance has been bought by one party by payment in advance, then he has a property right: see *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*⁵⁸ There would be there a total failure of consideration. When a customer

⁵⁵ [1954] 1 W.L.R. 139, 145, 146;
[1954] 1 All E.R. 145.

⁵⁷ [1942] A.C. 541; [1942] 2 All
E.R. 95.

⁵⁶ [1943] A.C. 203, 216; 59 T.L.R.
101; [1943] 1 All E.R. 76.

⁵⁸ [1943] A.C. 32.

pays money into his bank, assuming that it forms a credit balance, he has an accrued right to have it paid to him again. (If the account was in debit, it would not be a loan to the bank; the customer would be the banker's debtor.) A customer who has a current account in credit with his banker owes the banker no contractual obligation. Thus the customer's stipulation that he will check the account within 15 days and report any inaccuracy in it is not one which a bank could enforce, claiming damages or other relief if it were not performed. It is not an obligation. So, too, he is not obliged to demand payment of any part of his account within any period of time, specified or reasonable. So far as a current account customer is concerned, all his rights have accrued and it rests with him whether or not he will exercise them. Though money is not a chattel, one can illustrate the position in relation to a suitcase deposited in a left-luggage office. The obligation to produce the deposit ticket is only a step provided by the parties by agreement for convenience and security in the working out of their rights and duties with regard to the particular thing.

There has never been any authority with regard to the operation of war on a contract to create a right which did not previously exist. It is sometimes said that war abrogates all executory obligations and all rights to future performance of executory terms. On that, if the right of the appellants was still executory with regard to repayment because the respondents' obligation was still executory, the contract goes altogether. But if it is preserved it is something which is already there. What is preserved is the duty to account for and hold the money on behalf of the customer, the duty owed by the bank at the moment war broke out. The relation of banker and customer on current account is a purely personal contract. When a customer dies the current account terminates by its own force because it is a life contract, rather than because of an implied term that it shall come to an end. It is a contract for the contractual life of the customer, i.e., for so long as the customer retains contractual capacity, for he may become incapable of managing his commercial affairs. When a customer dies the current account cannot any longer be operated. There cannot be such a demand for any balance due as the contract calls for. Therefore the account is closed. It is only the contract that requires the account to be kept open. When the contract ends the account closes automatically because it is the contract which required it to be kept open.

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Whilst the current account is alive and operating the contract is: "We will be accountable to you for the equivalent of all moneys we receive on your behalf, and we will, so long as you operate the current account with us, pay you the whole or any part as and when you demand it. When the account closes we will pay the whole amount to you or your lawful legal representatives." That is part of the original contract. On death, for instance, the amount becomes forthwith payable without any possible demand because ex hypothesi the customer cannot make it; the production of the title would constitute it. The necessity for a demand does not survive here. The question here is whether money owing, or an obligation in the nature of a debt, at the moment when war broke out, is properly to be regarded as a right to a liquidated sum of money, it being liquidated by the closing of the account.

Sir Andrew Clark Q.C. in reply. On the outbreak of war the contract of current account was frustrated because it necessarily involved intercourse with the enemy. As from May 15, 1948, it was wholly gone. On its disappearance there was no accrued right which could survive under the contract nor any right of property under the contract. The appellants' right under the contract was a right to repayment of the money which they had lent, not a right to demand payment. The demand is a restriction on the customer's right inherent in the nature of the original debt. The other restriction was that payment could only be made at the Allenby Square branch. The necessity for demand and the localization at the branch are both terms of the contract. There was no accrued right, but, if there was any right, it was a right, fettered by the terms of the contract by those two conditions, to repayment of the balance of the moneys lent from time to time and not already repaid—to repayment admittedly in Palestine currency. Those fetters on the right having gone, the right remains a right to be paid in Palestine currency, but, instead of the appellants having to go to the Allenby Square branch to get it, the respondents must come to them at their residence in Transjordan, and the Palestine currency is the currency of Transjordan. The claim for sterling is simply a matter of the *lex fori*; it is purely procedural because of suing in England. If one has a claim for francs one cannot sue for francs in the English courts; one sues for the equivalent at the current rate of exchange.

So long as the necessity for a demand remains, there is no accrued right, in any sense of the term. Dealing with an accrued right as opposed to a right of property, in order to determine

whether there was an accrued right at the date of frustration it is necessary to examine the contract and the position of the parties one instant before the frustration. If at that moment either party had a right of action against the other, that right of action would be an accrued right. Primarily to establish an accrued right there must be an accrued right of action, but even if an accruing right were within the term "accrued right," there is here no accruing right. It has been said that *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag*⁵⁹ is authority for the proposition that an accruing right (i.e., a debt payable by instalments at fixed future dates) is within the exception laid down by Lord Dunedin in *Ertel Bieber & Co. v. Rio Tinto Co. Ltd.*⁶⁰ But that is not so, because counsel in the *Schering* case⁶¹ conceded that the right there in question was to be treated as an accrued right and did not argue the point. Therefore that point is open to the House; there is no authority on it.

But it is not necessary to go as far as that. At the very least an accrued right means one which has already, or will, without any further action by either party, by mere effluxion of time, become a right in respect of which an action can be maintained. The date may be uncertain because it may be a date which will depend on some circumstance, the time of the happening of which cannot be exactly predicted, but it must be a right which will accrue in the ordinary course of things necessarily by effluxion of time. Here there was no such right immediately before the frustration, nor could any such right arise thereafter, because it could only arise if a demand were made by the appellants at the Allenby Square branch, and during the war such a demand would have been illegal. So, as the court visualizes the war as of uncertain duration, continuing for any length of time, the making of such a demand could never thereafter arise and, on the terms of the contract, there was nothing either accrued or accruing. The whole difference between the majority and the minority in *Schering's* case⁶² was that the former considered that the bank could plead a complete cause of action after mere effluxion of time without any further act under the contract being necessary, whereas the latter thought that some further act would be necessary. The majority held that the contract was executed; the minority regarded it as executory. Further, it is in such cases not the right (if it be a right) which is suspended, but the right

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—⁵⁹ [1946] A.C. 219.⁶⁰ [1918] A.C. 260.⁶¹ [1946] A.C. 219, 228, 240.⁶² [1946] A.C. 219.

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to sue on the right. If there is no right to sue until some further act is done, there can be neither an accrued nor an accruing right, since the right to sue can never be perfected.

The garnishee cases are merely an anomaly. It is open to the House to overrule them, if necessary, and either they or *Joachimson v. Swiss Bank Corporation*⁶³ must be overruled. They were all decided on a false assumption as to what was the law. Nor can they stand with *Bagley v. Winsome and National Provincial Bank Ltd.*⁶⁴ They can only be reconciled by the explanation, not very easy to appreciate, that the service of the order nisi operates as a demand: see Paget on Banking, 5th ed., pp. 28-9; *Joachimson v. Swiss Bank Corporation*⁶⁵; *Bagley v. Winsome and National Provincial Bank Ltd.*⁶⁶; *Webb v. Stenton*⁶⁷; *Cowley v. Taylor*.⁶⁸

In the case of a loan one has to construe the contract to see whether a demand for payment is intended to be a condition precedent to any right of action to sue on it. If I lend a friend £5 it becomes his duty as from that moment to hand it back to me although it is implied that I shall not expect him to hand it back for a reasonable time and that I shall not at once sue him. But the cause of action is imputed then and there and the Statute of Limitations runs from the making of the loan. A debt on demand is immediately repayable unless there is an express provision that it is not repayable until an actual demand has been made.

The right to payment subject to making a demand is not a right of property: see *Schering's case*.⁶⁹ For the purposes of this exception "property" must be given a narrower meaning than the loose form in which it is used in statutes like the Law of Property Act, 1925. Otherwise no contract could ever be frustrated because every contract confers rights which in the broad sense can be regarded as rights of property. Even if one purchases a commodity and pays the purchase price in advance, that does not confer a right of property on the purchaser for the present purpose unless the property in the commodity has passed; that is the whole test. The test is whether one has anything which, if somebody interfered with the property in a wrongful way, one could protect by an injunction to restrain that interference. *Hugh Stevenson & Sons Ltd. v. Aktiengesellschaft für*

⁶³ [1921] 3 K.B. 110.⁶⁴ [1952] 2 Q.B. 236.⁶⁵ [1921] 3 K.B. 110, 116, 125, 128.⁶⁶ [1952] 2 Q.B. 236, 240-1.⁶⁷ (1883) 11 Q.B.D. 518, 524-5.⁶⁸ (1908) 124 L.T.J. 569.⁶⁹ [1946] A.C. 219, 252.

Carton-Industrie ⁷⁰ is a perfect example of what falls within the right of property. As to shares, the actual share has been described as a "fascicula of rights." Some are rights of property; others are concomitants of rights of property, being bound up in the chose in action. The shareholder has no right to an individual asset, only a right to have all the assets realized. The customer of a bank has no right of property in anything belonging to the bank at all. In the matter of rights of property contracts of life assurance are anomalies: see McNair on Legal Effects of War, 3rd ed., pp. 241-2, 245-6, as to their abrogation by war. *Seligman v. Eagle Insurance Co.* ⁷¹ was either a complete anomaly because of the special nature of the contract or the peculiar facts of the case or else it was wrongly decided. Property insurance is nearer a contract of current account than life insurance. If one can extract anything from the insurance cases it is that an insurance contract is automatically abrogated by the outbreak of war save in so far as accrued rights existed before that date.

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Their Lordships took time for consideration.

Apr. 1. The House dismissed the appeal.

May 4. Their Lordships delivered their reasons for dismissing the appeal.

LORD MORTON OF HENRYTON stated the facts and continued: The claim of the appellants as presented before Parker J. was put on two main grounds:—(i) that before the termination of the British mandate the appellants had demanded payment of the balance standing to the credit of their current account at the respondents' Allenby Square branch; that the respondents had refused or failed to pay in accordance with that demand; and that in consequence the appellants had, as from the date of such refusal, a right of action against the respondents for the sterling equivalent of the said balance. Such right of action was not property situate within the State of Israel; and, (ii) that alternatively, if there had been no such demand and refusal, the contract of banker and customer upon current account which had previously subsisted between the respondents acting through their branch at Allenby Square, Jerusalem, and the appellants, was frustrated by the war which, immediately upon the termination of the British mandate, broke out between the newly created

⁷⁰ [1918] A.C. 239.

⁷¹ [1917] 1 Ch. 519, 526.

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State of Israel and the neighbouring Arab States, and that there then arose a simple debt payable without demand by the respondents to the appellants, which was not property within the State of Israel.

Parker J. found as a fact that no effective demand for the payment of the whole of the balance of their current account at the Allenby Square branch was ever made by the appellants, and that, in consequence, the appellants' first ground of claim had not been made out. The appellants have not sought to challenge this finding of fact, either in the Court of Appeal or in your Lordships' House. Consequently, this appeal falls to be determined on the footing that immediately before the determination of the mandate and the outbreak of war, the contract between the appellants and the respondents under which the appellants' current account was kept at the respondents' Allenby Square branch was a subsisting contract, of which there had been no breach or repudiation by the respondents. Further, it is beyond dispute that immediately prior to that moment the appellants were entitled to be paid by the respondents, at their Allenby Square branch, the amount of the balance standing to the credit of the appellants' current account upon making a demand to that branch for such payment.

Sir Andrew Clark, for the appellants, contended that upon the outbreak of war the contract between the appellants and the respondents was wholly destroyed and with it was destroyed the right of the appellants to payment of their credit balance in accordance with that contract. Thereupon there arose, by operation of law, a new right in the appellants to have the amount of their credit balance repaid to them as money had and received by the respondents for a consideration which had wholly failed. This new right, being wholly independent of the contract between the parties, was free from the two limitations imposed upon the current account, viz., that the respondents were only bound to repay it (1) after demand made, and (2) at the Allenby Square branch. The sum of £P582,931.146 became a "simple debt" owing from the respondents to the appellants; that debt was locally situate at the "administrative centre" of the respondents (i.e., London) and the appellants were entitled to claim repayment in London. As a matter of procedure, the courts in England would not order repayment in foreign currency, and the appellants were therefore entitled to payment of the equivalent sum in pounds sterling which they had claimed by their writ. Counsel submitted, in the alternative, if I understood him aright,

that if any part of the pre-existing rights and obligations between the parties survived the outbreak of war, it was a debt shorn of all the incidents which attached to it immediately prior to the outbreak of war, including the restrictions that the debt was only payable at the Allenby Square branch and after demand made.

My Lords, I think I fully understand and appreciate counsel's first argument, and I shall deal with it hereafter, but I say at once that I can see no foundation whatever for his alternative argument. The right of the appellants immediately before the outbreak of war has already been stated and is beyond dispute. I can well understand the argument that this right was wholly destroyed on the outbreak of war, but I see no reason why a right to be paid a sum in Palestine on demand, if it survived the outbreak of war, should be changed into a right to be paid the same sum in some other place, without demand. Nor was any authority cited to your Lordships which gave any support to this argument.

With regard to Sir Andrew's first argument, it is to be noted that that argument fails in limine if the appellants' right to be paid the credit balance survived the outbreak of war and was a right to be paid at the Allenby Square branch. In that event there could be no doubt that that right vested in the custodian and was rightly paid to him by the respondents. Before I consider this argument further, I shall refer to two authorities on which Parker J. and the Court of Appeal strongly relied.

Lord Dunedin in *Ertel Bieber & Co. v. Rio Tinto Co. Ltd.*¹ stated the common law of England as to trading with the enemy as follows:—"My Lords, the proposition of law on which the judgment of the courts is based is that a state of war between this kingdom and another country abrogates and puts an end to all executory contracts which for their further performance require, as it is often phrased, commercial intercourse between the one contracting party, subject of the King, and the other contracting party, an alien enemy, or anyone voluntarily residing in the enemy country. I use the expression 'often phrased commercial intercourse' because I think the word 'intercourse' is sufficient without the epithet 'commercial.' As to this I agree with the judgment of the Court of Appeal in the case of *Robson v. Premier Oil and Pipe Line Co. Ltd.*,² where Pickford L.J., delivering the judgment of the Court, Lord Cozens-Hardy M.R., himself and Warrington L.J., said: 'The

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¹ [1918] A.C. 260, 267-8; 34 T.L.R. 208.

² [1915] 2 Ch 124, 136; 31 T.L.R. 420.

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“ prohibition of intercourse with alien enemies rests upon public
 “ policy, and we can see no ground either on principle or autho-
 “ rity for holding that a transaction between an alien enemy and
 “ a British subject which might result in detriment to this
 “ country or advantage to the enemy is permissible because it
 “ cannot be brought within the definition of a commercial trans-
 “ action.’ That so expressed it is an incontrovertible proposition
 “ admits, I think, upon the authorities, of no doubt.”

Lord Dunedin went on to point out that there are certain exceptions to the general rule. He said³: “ There is indeed no
 “ such general proposition as that a state of war avoids all
 “ contracts between subjects and enemies. Accrued rights are
 “ not affected though the right of suing in respect thereof is
 “ suspended. Further, there are certain contracts, particularly
 “ those which are really the concomitants of rights of property,
 “ which even so far as executory are not abrogated. Such as, for
 “ instance, the contract between landlord and tenant, of which
 “ an example may be found in the recent case of *Halsey v.*
 “ *Lowenfeld*.⁴ In other words, the executory contract which is
 “ abrogated must either involve intercourse, or its continued
 “ existence must be in some other way against public policy as
 “ that has been laid down in decided cases.”

The law of Israel on this subject is admittedly the same as the common law of England. No authority was cited which decided whether a credit balance on current account payable on demand is or is not an accrued right within the meaning of the exception; but I agree with the courts below in thinking that strong support for the view that it is such a right is to be found in the case of *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag*.⁵

The facts in that case are summarized in the headnote as follows: “ By a contract made in February, 1936, a German
 “ company agreed to purchase from a Swedish bank reichsmarks
 “ to the value [of] £84,000, payment therefor to be postponed for
 “ eight years, and an English company, a subsidiary of the
 “ German company, as surety guaranteed the payment of
 “ £50,400, agreeing to pay the bank this sum by half-yearly instal-
 “ ments over a period of eight years, at the same time acquiring
 “ the right to an assignment of the bank’s right against the
 “ German company, whose liability to pay £84,000 was to be
 “ discharged in the event of the £50,400 being paid. By a further

³ [1918] A.C. 260, 269.⁵ [1946] A.C. 219; 62 T.L.R. 122;⁴ [1916] 2 K.B. 707; 32 T.L.R. [1946] 1 All E.R. 36.

“ contract, dated April 16, 1936, entered into with the Swedish bank, the English company again guaranteed the debt and undertook to pay the instalments. It was provided that the guarantee and agreement therein contained were made in accordance with the laws of England. By another document of the same date the English company created a security for the performance of its contract. A number of instalments had been paid before the outbreak of war with Germany.”

It was held by Lord Thankerton, Lord Porter and Lord Goddard (Lord Russell of Killowen and Lord Macmillan dissenting) “ that, on the true construction of the documents, the respondent bank having fully performed their obligations to the German company before the outbreak of war, nothing remained to be done under the contract, which was one between an English company and a neutral, but to discharge an accrued debt by instalments; accordingly, since war does not abrogate or discharge a debt incurred before the declaration, the obligation to pay and the right to recover were only suspended.” Lord Thankerton said ⁶: “ I am inclined to agree with Sir Arnold McNair’s suggestion (Legal Effects of War, 2nd ed., at p. 93) “ that the distinction between “ executed ” and “ executory “ “ contracts ” may not be very helpful in this connexion and “ that it may be found safer to say that . . . the effect of the “ outbreak of war upon contracts legally affected by it is to “ abrogate or destroy any subsisting right to further performance “ other than the right to the payment of a liquidated sum of “ money, which will be treated as a debt and will survive the “ outbreak of war.” In this view, I proceed to consider what is “ included in the phrase, ‘ a liquidated sum of money, which will “ be treated as a debt.’ The appellants’ counsel admitted that “ a debt payable by instalments would be so included, and that “ provision for discount on anticipation of the instalment dates “ would not alter the position, nor would express provision for the “ acknowledgment in writing of each sum paid affect the matter. “ In my opinion the fact that the creditor held security for the “ payment of the debt, which would fall to be restored to the “ debtor on payment of the debt, would make no difference even “ though the security had been absolutely assigned to the creditor, “ and would require retransfer to the debtor. In my opinion, the “ present case only raises one further point, namely, the fact that “ the appellants were bound, as principals to the respondent bank,

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“ to discharge the debt in respect of which the German company
 “ were the original principal debtors, and were therefore entitled
 “ under the April contract on payment to the respondent bank of
 “ each instalment to an assignment by the latter of a like sterling
 “ amount of their claim against the German company. My
 “ Lords, I cannot think that this makes any difference to the
 “ position. The appellants, under the April contract, were bound
 “ to discharge the whole debt within a period which would
 “ terminate before the lapse of the eight years, when the liability
 “ of the German company to make any payment towards the
 “ debt would first arise; in other words, the appellants were
 “ bound to acquire the debt, and their being placed by assign-
 “ ment in the shoes of the respondent bank is merely incidental
 “ to the discharge of the debt owned by the respondent bank
 “ and is not different in substance from the case of the return of
 “ securities to which I have already referred. It is important to
 “ make clear that the principle of abrogation does not involve
 “ destruction of the contract so far as already performed. That
 “ which is abrogated is the further performance of the contract, as
 “ from the outbreak of war; or as Lord Dunedin expresses it in
 “ the passage already quoted, the continued existence of the
 “ contractual relationship is prohibited.”

Lord Thankerton said⁷: “ It seems clear to me that this
 “ reservation included matters involving intercourse with the
 “ enemy, but as Lord Dunedin points out, the right of action is
 “ postponed. It seems equally clear it might involve substantial
 “ economic benefit to the enemy. The declaration of Simonds J.
 “ contains no such reservation, and the result, in my opinion, is
 “ to confiscate the right of debt, which had arisen to the
 “ respondent bank on the delivery of the reichsmarks on April 28,
 “ 1936. I am not aware of any precedent for such confiscation,
 “ and it is clearly not justified under the decision of this House
 “ in the *Ertel Bieber* case.⁸ Indeed it is inconsistent with it.
 “ I may add that in the earlier case of *Esposito v. Bowden*,⁹ the
 “ performance of the contract had not commenced prior to the
 “ outbreak of war.”

Lord Russell of Killowen, who dissented, but to this extent
 agreed with the majority, said¹⁰: “ Thus a contract which is
 “ completely executed on one side, and under which nothing
 “ remains to be performed except payment to be made by the
 “ other of a liquidated sum whether already due, or debitum in

⁷ [1946] A.C. 219, 241-2.⁸ [1918] A.C. 260.⁹ (1857) 7 E. & B. 763.¹⁰ [1946] A.C. 219, 248-9.

“ praesenti solvendum in futuro, is unaffected by the outbreak of
 “ war. The payments cannot in fact take place between enemies
 “ in wartime; so long as the war lasts the payment is suspended.
 “ Nor is enemy property confiscated at common law by the out-
 “ break of war, and consequently contractual rights and obliga-
 “ tions incidental to the ownership of property are not put an end
 “ to at common law by the outbreak of war. The enforcement of
 “ them during the war may be impossible, but they will survive
 “ the war.”

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Lord Goddard said ¹¹: “ It is beyond question that if the
 “ result of performance of a contract would be beneficial to the
 “ enemy or detrimental to this country the further performance
 “ is forbidden and the contract abrogated, though again rights,
 “ such as debts, accrued before the war are unaffected. This is
 “ illustrated by the order in the *Ertel Bieber* case ¹² made by the
 “ Court of Appeal and affirmed in this House and which your
 “ Lordships have seen in the printed book. Now one of the
 “ reasons why a suspensory clause to operate in the event of war
 “ in a contract for the sale of goods to an enemy will not save
 “ the performance of the contract from abrogation as illegal is
 “ that to ensure to an enemy a supply of goods or raw material
 “ after the war is or may be to enhance his resources during the
 “ war. If this consideration were taken to its full logical extent
 “ it might be said to apply to debts, as it would certainly be of
 “ some benefit to an enemy to have an English debt remaining
 “ due to him even though it is not payable till the end of the war.
 “ He might be able to raise money from neutrals upon an assign-
 “ ment of his rights which could be enforced at the conclusion
 “ of the war. But this doctrine never has been applied to debts
 “ arising out of previous contracts, and I am not prepared now
 “ for the first time to apply it and to hold that accrued causes of
 “ action are destroyed and not suspended because otherwise an
 “ enemy might obtain a discount or some other benefit by reason
 “ of the continued existence of the obligation.”

My Lords, I have quoted these passages in full because I think
 that they supply a conclusive answer to Sir Andrew's argument.
 He began by referring to the well-known case of *Joachimson v.*
Swiss Bank Corporation,¹³ in which the Court of Appeal held that
 where money is standing to the credit of a customer on current
 account with a banker the making of an actual demand is a condi-
 tion precedent to the bringing of an action to recover such money,

¹¹ [1946] A.C. 219, 269-70.¹³ [1921] 3 K.B. 110; 37 T.L.R. 534.¹² [1918] A.C. 260.

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in the absence of any such agreement to the contrary. It followed, said counsel, that the appellants had no right of action at the moment when war broke out; their rights were purely contractual rights and the contract was abrogated wholly by the outbreak of war. A right which did not carry with it an existing cause of action was not an "accrued" right within the meaning of Lord Dunedin's observations in the *Ertel Bieber* case.¹⁴ My Lords, in my view this argument is inconsistent with the decision of this House in the case of *Schering*¹⁵ and with the reasoning on which that decision is based. In the *Schering* case¹⁵ there was no existing right of action to recover the remaining instalments, for these instalments had not yet become payable; yet this House held that the right to receive these instalments when they fell due was a right which survived the outbreak of war. Having regard to this decision, I do not think that the right which was vested in the appellants at the outbreak of war can be held to have been destroyed merely because no action could be brought to recover it without a previous demand. I am content, without elaborating the matter further in words of my own, to adopt the reasoning of Jenkins L.J. when he said,¹⁶ speaking of the *Schering* case¹⁷: "If, as was recognized in the case just cited, a debt contracted before the outbreak of war, but made payable by instalments on dates occurring after such outbreak, is not abrogated by such outbreak, but merely suspended as regards enforcement, and this notwithstanding the right of the debtor to an acknowledgment, and transfer of a security, upon the payment of each instalment, I fail to see why it should be held that a debt contracted before the outbreak of war should be cancelled merely because it is payable on demand. By parity of reasoning a credit balance kept by an enemy with a bank in this country on terms that it was to be payable against production of a passbook or deposit receipt would be cancelled by the outbreak of war. Once the exception of accrued rights is accepted, and once the basis of it, viz., that the law in its concern to prevent benefit to enemies does not go the length of confiscating enemy property, is recognized, I see no reason in principle or common sense why a debt for the recovery of which some formality, such as a demand for payment or the production of some indicia of title, is made requisite, should on that ground be excluded from the benefit of the exception.

¹⁴ [1918] A.C. 260.¹⁵ [1946] A.C. 219.¹⁶ [1953] 2 Q.B. 527, 569; [1953]

2 All E.R. 263.

¹⁷ [1946] A.C. 219.

"This would, indeed, be nothing more or less than the very
 "confiscation of proprietary rights which the law declines to
 "countenance."

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My Lords, I do not attempt the task of formulating an exhaustive description of the rights which do and the rights which do not survive the outbreak of war; but I am quite satisfied that the right to be paid a credit balance on a current account is a right which survives. It is a right which the creditor can assign or bequeath by his will; it passes on his intestacy and it is, in my opinion, an "accrued right" in the sense in which these words were used by Lord Dunedin in the *Ertel Bieber* case.¹⁸ It was therefore suspended, and not destroyed, by the outbreak of war, and immediately after the outbreak of war it was locally situate in the newly created State of Israel. Thus it became subject to the legislation of that State, was vested in the custodian, and was rightly paid to the custodian by the respondents. There was a difference of opinion in the court below as to whether the necessity for a demand survived the outbreak of war. I incline to the view that it did, but I do not regard a decision on this question as being necessary for the decision of this case.

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The question whether the appellants will or will not ultimately recover the large sum already paid by the respondents to the custodian is one which will be answered by Israeli legislation, or by the arrangements made between the State of Israel and the Arab countries when a treaty of peace is signed; but they cannot recover that sum from the respondents.

It was for those reasons that I formed the view that the appeal should be dismissed.

LORD REID. My Lords, before May 15, 1948, Jerusalem was part of the territory governed under the British mandate for Palestine. The respondents, who are a British bank, had a branch office at Allenby Square in Jerusalem, and the appellants, a bank whose head office is now situated in the territory of the Hashemite Kingdom of Jordan, were then carrying on business at the Morcos building within the Old City. Under an agreement of 1939 the appellants had a current account with the respondents at their Allenby Square branch, and on May 14, 1948, there was a credit balance on that account in favour of the appellants of £P582,931.

The British mandate came to an end at midnight, May 14-15,

¹⁸ [1918] A.C. 260, 269.

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1948. The new State of Israel was then set up and immediately war broke out between that State and the Arab States, including the Hashemite Kingdom. Allenby Square was in territory occupied by Israeli forces but the appellants' place of business was in territory occupied by forces of the Hashemite Kingdom.

It is admitted that on all questions relevant to the decision of this case there is no difference between the law of England, the law of Palestine, and the law of Israel which superseded the law of Palestine in the territory occupied by the Israeli forces. So it is necessary to determine what under English law is the effect of the outbreak of war on a current account kept by a bank in this country for a customer resident in enemy territory.

The general principle is not in dispute. With certain exceptions the outbreak of war prevents the further performance of contracts between persons in this country and persons in enemy territory. It is not merely that an enemy cannot sue during the war, and that trading and intercourse with the enemy during the war are illegal. Many kinds of contractual rights are totally abrogated by the outbreak of war and do not revive on its termination. On the other hand, there are other kinds of contractual rights which are not abrogated; they cannot be enforced during the war, but war merely suspends the right to enforce them and they remain and can be enforced after the war. "There is indeed "no such general proposition as that a state of war avoids all "contracts between subjects and enemies. Accrued rights are "not affected though the right of suing in respect thereof is "suspended. Further there are certain contracts, particularly "those which are really the concomitants of rights of property, "which even so far as executory are not abrogated": *Ertel Bieber & Co. v. Rio Tinto Co. Ltd.*,¹⁸ per Lord Dunedin.

The first question in this case is whether the appellants' right to obtain payment of the sum at their credit on their current account was totally abrogated by the outbreak of war or whether that right was merely suspended. For a reason which will appear later, the appellants say that their right was totally abrogated, but the respondents say that it was merely suspended: the appellants say that their right was not an "accrued right"; the respondents say that it was. In the case of *Ertel Bieber & Co.*¹⁹ it was not necessary to consider precisely the scope of the exception of accrued rights from abrogation: it appears to be an extension of the principle that rights of property are not

¹⁸ [1918] A.C. 260, 269.¹⁹ [1918] A.C. 260.

destroyed or confiscated on the outbreak of war. A right to payment of money due under a contract is not strictly speaking a right of property—the creditor has no property in the debtor's money before it is paid to him—but if before the outbreak of war the creditor had an immediate and unqualified right to sue the debtor for money due under a contract then it is not disputed that such a right is suspended but is not abrogated. The creditor in such a case has not only an accrued right but an accrued right of action. But the appellants' right in this case fell short of that, and I must now consider first what was the appellants' right immediately before the outbreak of war.

In *Joachimson v. Swiss Bank Corporation*²⁰ the firm N. Joachimson had a current account with the defendant bank. On August 1, 1914, the firm was dissolved by the death of one of the partners and on that date a balance of £2,321 was standing to the credit of the firm. Later one of the partners raised an action in the firm name to recover that sum, but for some reason he gave an undertaking that the only causes of action relied on arose on or before August 1, 1914. His action failed because, although the customer's account was then in credit, the customer had then no cause of action against the bank. The case decides, in my judgment rightly, that a customer must make a demand for payment at the branch where his current account is kept before he has a cause of action against the bank. Generally it is the duty of a debtor to seek out his creditor and tender the amount of his debt, but there is nothing to prevent parties from agreeing, if they wish, that that shall not be the duty of the debtor, and it was held that a contract of current account necessarily implies an agreement that that shall not be the bank's duty; otherwise the whole object of the contract would be frustrated. The balance at the customer's credit is only payable at the branch where the current account is kept and so the customer must go there or send his instructions there before he can get his money.

At one stage of this case the appellants maintained that they had made a demand for payment before the outbreak of war, but they do not now maintain that and therefore the position is that at the outbreak of war they had no cause of action against the respondents. But in my judgment that does not mean that there was no debt owing to them by the respondents. The sum at their credit was immediately payable to them. It is true that it was only payable in a particular place and that to get the money they

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had to go there and ask for it, but the case is in my opinion quite different from a case where one party still has to perform some service or fulfil some obligation under the contract in order to earn the money. In such a case further performance of such contractual obligation being prevented by frustration that party can never do what is necessary to earn the money and so can never acquire a right to have it paid to him; nothing was owing to him when the war broke out, so there is no "accrued right" to suspend.

But the sum at the credit of a customer on current account has always been regarded as a debt due by the bank to the customer. In *Rogers v. Whiteley*²¹ the respondent was a banker, a judgment debtor had a credit on current account with him and a garnishee order attached "all debts owing or accruing due" from him to the judgment debtor. There was no suggestion that the word "debts" in Ord. 45, r. 1, is used in any special sense, and Lord Halsbury L.C. said²² that the order attached "all debts, that is to say all money which Mr. Whiteley could be called upon to pay away." In *Plunkett v. Barclays Bank Ltd.*²³ du Parc J. (as he then was) said: "I find it impossible to say that money paid into a client account kept with a bank in the name of a solicitor is not a debt owing from the banker to the solicitor. It cannot be denied that the relation of debtor and creditor subsists between the bank and the solicitor. The solicitor may at any time draw a cheque upon the account and the bank must honour it." In *Swiss Bank Corporation v. Boehmische Industrial Bank*²⁴ Scrutton L.J. said: "Does this debt of £9,000 arise in this country? It is a sum held by a banker, who is resident in this country, for his customer and not payable until it is demanded in this country. In my view that is a debt arising in this country and situate in this country." And Atkin L.J.²⁵ (as he then was) referred to that debt as "property." In *Richardson v. Richardson*²⁶ Hill J. cited several cases where judges of great authority have referred to sums due on current account as "debts" or "property."

It was argued that although that may have been the view generally held before *Joachimson's* case,²⁷ that decision shows that all that the customer of a bank really has is a right to create

²¹ [1892] A.C. 118; 8 T.L.R. 418.

²² [1892] A.C. 118, 121.

²³ [1936] 2 K.B. 107, 118-9; 52 T.L.R. 353; [1936] 1 All E.R. 653.

²⁴ [1923] 1 K.B. 673, 681; 39 T.L.R. 179.

²⁵ [1923] 1 K.B. 673, 684.

²⁶ [1927] P. 228; 43 T.L.R. 631.

²⁷ [1921] 3 K.B. 110.

a debt by performing a condition of the contract of current account, i.e., making a demand for payment. But eminent judges who do not use inaccurate language have since that case continued habitually to refer to sums due on current account as debts although no demand for payment has been made. Indeed, I think that in *Joachimson's* case²⁸ Atkin L.J. recognized that there is a debt before any demand for payment is made, for he said: "It was suggested in argument that the effect of our "decision will be to alter the facilities given to an execution "creditor to attach his debtor's bank account in garnishee proceedings. This appears to be a mistake. The provisions of "Order 45 apply to debts owing or accruing from the garnishee, "and this expression includes debts to which the judgment debtor "is entitled though they are not presently payable." There is no suggestion of any anomaly in treating a sum at credit on current account as a debt for the purpose of garnishee proceedings and I do not see the point of the last part of the passage I have just quoted unless Atkin L.J. regarded such a sum as in fact a debt to which the judgment debtor is entitled but which is not presently payable. It is clear that the existence of a debt does not depend on there being a present right to sue for it. Debitum in presenti, solvendum in futuro is a familiar concept and a demand for payment is in my view merely that which makes the debt solvendum.

In *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag*²⁹ a debt was payable by instalments and when war broke out some of the instalments were not yet payable. The right to payment of those instalments was held not to have been abrogated in spite of certain specialties in the case. The view of the majority of the House with regard to the contract was that "all that "remained was the payment of the price, and the only provisions "remaining operative related to the payment of the debt due in "respect of the price, and the relative safeguards for its payment" (*per* Lord Thankerton³⁰). The preservation of debts from abrogation is to some extent anomalous and I agree with what Lord Goddard said³¹: "Now one of the reasons why a suspensory clause to operate in the event of war in a contract for "the sale of goods to an enemy will not save the performance of "the contract from abrogation as illegal is that to ensure to an "enemy a supply of goods or raw material after the war is or may

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²⁸ [1921] 3 K.B. 110, 131.²⁹ [1946] A.C. 219.³⁰ *Ibid.* 236.³¹ *Ibid.* 269.

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“ be to enhance his resources during the war. If this consideration
 “ were taken to its full logical extent it might be said to apply
 “ to debts, as it would certainly be of some benefit to an enemy
 “ to have an English debt remaining due to him even though it
 “ is not payable till the end of the war. He might be able to
 “ raise money from neutrals upon an assignment of his rights
 “ which could be enforced at the conclusion of the war. But this
 “ doctrine never has been applied to debts arising out of previous
 “ contracts, and I am not prepared now for the first time to apply
 “ it and to hold that accrued causes of action are destroyed and
 “ not suspended because otherwise an enemy might obtain a
 “ discount or some other benefit by reason of the continued
 “ existence of the obligation.” But I think that Lord Goddard
 went too far in referring to “ accrued causes of action”: in
Schering’s case³² there can have been no accrued cause of action
 at the outbreak of war because the instalments in question had
 not then become payable.

Accordingly, I am of opinion that on May 15, 1948, there was
 a debt of £P582,931 due by the respondents to the appellants
 and that it was a debt situated in Jerusalem where alone it was
 payable. Further performance of the contract of current account
 was prevented by the outbreak of war so that no further banking
 services could be performed by the respondents for the appellants,
 but the debt fell within the class of accrued rights and was not
 abrogated. The respondents have paid the amount of the debt
 to the Custodian of Absentee Property in Israel, and if this was a
 debt situated in Israel after May 15 they were bound to make
 that payment and the appellants cannot recover anything in this
 action. To succeed, the appellants would have somehow to
 establish that any debt owing to them was not after May 15
 situated in Israel, because it is only in that case that the respon-
 dents would have been wrong in making payment to the
 custodian in Israel.

The appellants’ main contention is that their rights under the
 contract were wholly abrogated, because they follow that up by
 maintaining that in place of those rights there sprang up a new
 right to the same sum which was not situated in Israel, and they
 base this contention on the authority of *Fibrosa Spolka Akcyjna*
*v. Fairbairn Lawson Combe Barbour Ltd.*³³ But if their original
 right to the money was not abrogated the possibility of there

³² [1946] A.C. 219.³³ [1943] A.C. 32; 58 T.L.R. 308;
[1942] 2 All E.R. 122.

being this new right does not arise and I shall say nothing about it.

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Alternatively, on the footing that their original rights were not totally abrogated, they contend that the original debt was only situated in Jerusalem because of the terms of the contract, and once those terms have been abrogated the debt ceased to be situated there and became due as an ordinary debt in England where the respondents have their principal place of business. That would be a startling result. In times when transfer of money from one country to another is restricted it may be of great importance to a debtor that his debt should only be payable at the place stipulated. What survived the outbreak of war was the original debt, and the original debt was a debt payable at the respondents' branch in Jerusalem on demand there. The right to demand and to sue for that debt was suspended, but I do not see how that suspension could alter the nature of the debt. For the reasons which I have stated I agreed that this appeal should be dismissed.

LORD TUCKER. My Lords, the law with regard to the effect upon contracts of frustration due to war is based upon public policy. It requires that as to future performance the contract is considered as abrogated, but that in so far as certain accrued rights are concerned they are to be preserved and kept in suspense. No attempt has ever been made to give an exact definition of these rights or to compile a comprehensive list of them. It is clear, however, from the cases of *Ertel Bieber*³⁴ and *Schering*³⁵ that they include accrued causes of action for debt and certain concomitant rights in respect of property, but it is also clear from the latter case that so far as liquidated sums of money are concerned they are not confined to cases where a cause of action has actually accrued at the date of frustration, but include instalments payable in the future. How does public policy require the special relationship existing between banker and customer in respect of the balance standing to the customer's credit on current account to be treated? It is true that this relationship requires a formal demand by the customer before his rights crystallize into a cause of action, but what is there in the requirements of public policy that necessitates a distinction being drawn between the case where the customer has made formal demand a moment before the outbreak of war and one where he has not gone through this

³⁴ [1918] A.C. 260.

³⁵ [1946] A.C. 219.

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formality? In both cases there is standing to his credit a sum of money which before war was for all practical purposes as valuable to him as if it were cash in his own safe, and in each case the outbreak of war makes payment illegal. In one case is there to be suspension and in the other confiscation? Or is the law, in order to escape from this dilemma, to devise some novel equitable remedy to avoid the consequences of the application of its own arbitrary rule?

I say "novel" remedy because, in my view, it is impossible to say in such a case that there has been a total failure of consideration.

My Lords, I do not consider that the answer to these questions is to be found by a minute examination of the precise language used by noble Lords in previous cases in dealing with different facts, but rather by endeavouring to discover the broad general principles of public policy upon which those decisions were based and then applying them to the special creditor and debtor relationship existing between banker and customer. So judged, I can find no valid distinction from the point of view of public policy between the one kind of obligation and the other. Private international law does not sanction the confiscation of enemy debts or property, and to recognize for present purposes a distinction between a current account balance which has been the subject of a formal demand and one which has not would be to sanction a very thinly disguised form of confiscation. On these broad lines I formed the view that this appeal should be dismissed.

Before parting with this case I would, however, desire to say that I reserve for future consideration the question whether the necessity for demand before action in respect of sums standing to the credit of a customer's current account during the currency of the account, as decided in *Joachimson v. Swiss Bank Corporation*,³⁶ applies equally in all circumstances to the balance after the account has been closed and thereby ceased to be current.

In the present case, as the outbreak of war was the event which closed the account, I think that the situation must be viewed as at the moment before war broke out when the account was still current.

LORD ASQUITH OF BISHOPSTONE. My Lords, I agree with the opinion just delivered by my noble and learned friend Lord Morton of Henryton.

³⁶ [1921] 3 K.B. 110.

The entire case for the appellants would seem to rest on the assumption that the "accrued rights" which admittedly survive the frustration of a contract are limited (apart from rights of property) to "accrued causes of action." This assumption is, upon the decision of this House in the case of *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag*,³⁷ unfounded. The right to the sum represented by the credit balance on current account outstanding at the outbreak of war was in my view a "right to . . . a liquidated sum of money, which will be treated as a "debt and will survive the outbreak of war" within the formula adopted by Lord Thankerton from Sir Arnold McNair's *Legal Effects of War*, 2nd ed., p. 93, and applied by this House in the *Schering* case.³⁷

LORD COHEN. My Lords, it is common ground between the parties that: (I) Had the appellants demanded the balance standing to their credit with the Allenby Square branch of the respondents immediately before the outbreak of war the resultant debt would have been locally situate in Palestine. (II) The contract of current account made between the parties on February 14, 1939, was frustrated by the outbreak of war at least in the sense that the further performance by the respondents of their obligation to render banking services to the appellants was prohibited by the law of Israel as contrary to public policy. (III) If, notwithstanding frustration, the respondents remained bound to pay to the appellants at the Allenby Square branch the amount of the credit balance due to the appellants, that obligation was a chose in action locally situate in Israel and became vested in the Custodian of Absentee Property under the Absentee Property Regulation which was superseded by the Absentee Property Law, 1950.

The appellants, however, contend that all rights and liabilities of the parties under the current account contract were completely ended by the outbreak of war between Israel and Transjordan and that the only liability of the respondents was in quasi-contract arising from a total failure of the consideration for the retention by the respondents of the amount of the credit balance. This failure, said Sir Andrew Clark, gave rise to a claim for money had and received and such a claim was necessarily situate in London as being the chief administrative centre of the respondents.

In the alternative, Sir Andrew submitted that the liability

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under the original contract was only locally situate in Palestine because that was the country where demand had to be made, that on the outbreak of war it became illegal to make a demand at Allenby Square since that would have involved the appellants in intercourse with an enemy and that accordingly the debt, shorn of all frills, shifted to London.

My Lords, your attention was directed to a number of cases. It will be sufficient for my purpose to refer to only two of them, namely, *Ertel Bieber & Co. v. Rio Tinto Co. Ltd.*³⁸ and *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag.*³⁹

In the former case the contracts in question were for the sale of cuprous ore by an English company to three German companies by instalments extending over a number of years. Each of the contracts contained a suspensory clause providing that if owing to strikes, war or any other cause over which the sellers had no control, they should be prevented from shipping or delivering the ore, the obligation to ship and deliver should be suspended as therein mentioned. At the date of the outbreak of war between England and Germany some of the contracts had been partially executed, the others were wholly executory. In your Lordships' House it was not argued that under English law apart from the suspensory clause the contracts would not be abrogated, but it was submitted that they were saved by the suspensory clause. This House rejected that contention and affirmed the decision of the courts below. Lord Dunedin, while recognizing the general principle that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is not permissible, said⁴⁰: "There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected though the right of suing in respect thereof is suspended. Further, there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated. Such as, for instance, the contract between landlord and tenant, of which an example may be found in the recent case of *Halsey v. Lowenfeld*." ⁴¹ Lord Sumner said⁴²: "The whole contract so far as it is mutually executory is dissolved. Again, the suspension of the right of suit in the case of enemy nationals, for causes of action already accrued, until the conclusion of peace

³⁸ [1918] A.C. 260.³⁹ [1946] A.C. 219.⁴⁰ [1918] A.C. 260, 269.⁴¹ [1916] 2 K.B. 707.⁴² [1918] A.C. 260, 289.

“ is not an argument in favour of substituting suspension by
 “ agreement for discharge by operation of law.”

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Lord Dunedin and Lord Sumner both recognize that there may be accrued rights which are suspended notwithstanding the abrogation of the contract which gave rise to those rights, but Sir Andrew Clark, relying in particular on the language of Lord Sumner, submits that suspension only takes place if the accrued right is an accrued cause of action at the date of the outbreak of war.

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My Lords, the decision in the second case to which I have referred is, I think, fatal to this contention. In *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag*⁴³ the appellants had guaranteed the repayment of part of a debt incurred by a German company to the respondents before the outbreak of war, undertaking to pay the sum so guaranteed by half-yearly instalments over a period of eight years. Some of the instalments remained unpaid at the outbreak of war and the question was whether the appellants' obligation in respect thereof was abrogated or suspended. Your Lordships' House, by a majority, held that at the outbreak of war nothing remained to be done under the contract but to discharge an accrued debt by instalments and that the obligation to pay and the right to recover were only suspended. It is to be observed that none of the instalments in question were due at the outbreak of war and accordingly that it could not be said that there was an accrued cause of action. Lord Thackerston, one of the majority, in the course of his judgment cited passages from the judgments of Lord Dunedin and Lord Sumner in the *Ertel Bieber* case,⁴⁴ and after expressing the opinion that there was no valid distinction between the case of a contract between a British subject and an enemy subject and the case of a contract between a British subject and a neutral subject, continued⁴⁵: “ I am inclined to agree with Sir Arnold
 “ McNair's suggestion (Legal Effects of War, 2nd ed., at p. 93),
 “ “ that the distinction between “ executed ” and “ executory
 “ “ contracts ” may not be very helpful in this connexion and
 “ “ that it may be found safer to say that . . . the effect of the
 “ “ outbreak of war upon contracts legally affected by it is to
 “ “ abrogate or destroy any subsisting right to further performance
 “ “ other than the right to the payment of a liquidated sum of
 “ “ money, which will be treated as a debt and will survive the

⁴³ [1946] A.C. 219.⁴⁵ [1946] A.C. 219, 240.⁴⁴ [1918] A.C. 260.

H. L. (E.) “ ‘ outbreak of war.’ In this view, I proceed to consider what is
 1954 “ included in the phrase, ‘ a liquidated sum of money, which will
 ARAB BANK “ ‘ be treated as a debt.’ The appellants’ counsel admitted that
 LD. “ a debt payable by instalments would be so included, and that
 v. “ provision for discount on anticipation of the instalment dates
 BARCLAYS “ would alter the position, nor would express provision for the
 BANK. “ acknowledgment in writing of each sum paid affect the matter.”
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Sir Andrew Clark submitted that the case was not an authority for the proposition that the right to future instalments of a debt was only suspended since that point had been conceded not argued. I am unable to accept that view of the case. Their Lordships were dealing with a question of public policy and the case must, I think, be treated as a decision of this House that the right to such instalments is only suspended.

Sir Andrew then argued that be this as it may, there is a vital distinction between a debt payable on demand and a debt payable by instalments on fixed dates since the necessity for demand involves intercourse between enemies. My Lords, I am unable to recognize the validity of this distinction. It is well settled by authority that the basic relationship between banker and customer is that of debtor and creditor. The appellants’ right was a right to a liquidated sum the amount of which was ascertained and the consideration for which had been fully given by the appellants. Their right was, I think, clearly an accrued right in the sense in which that term was used by Lord Dunedin in the *Ertel Bieber* case.⁴⁶

I agree with Jenkins L.J. that the necessity for demand survives the abrogation of the further performance of the contract but should probably be regarded as surviving not by virtue of the contract itself but as a characteristic in the nature of a restriction on its recovery inherent in the debt contracted as a result of the past operation of the contract. Had I taken the alternative view favoured by Singleton L.J., that the necessity for demand disappeared with the contract, I should have agreed with him that none the less the right was an accrued right and that that right was locally situate in Palestine. Sir Andrew argued that once it became unnecessary for his client to make a demand at the Allenby branch it was the duty of the respondents to seek him wherever he might be, and that accordingly the debt, like any other debt, was situate at the chief administrative centre of the respondents, i.e., London. This argument is, I think, fallacious.

⁴⁶ [1918] A.C. 260.

It was of the essence of the original contract that the debt should be payable at the Allenby Square branch and that Palestine law should govern the obligations of the parties. So long as the appellants have to found their claim on the contract, it must, I think, be regarded as a right situate down to the outbreak of war in Palestine and thereafter in Israel.

In view of the conclusion I have reached that the right of the appellants to the balance to their credit at the Allenby Square branch was only suspended and not abrogated, it becomes unnecessary for me to consider at length Sir Andrew Clark's alternative argument based on quasi-contract. I would, however, observe that there does not appear to me to have been a total failure of consideration. The consideration for the respondents' right at any given moment to retain the balance to the credit of the appellants was, I think, not only their promise to render banking services in the future but also the services they had already rendered in collecting the items which went to compose the credit balance.

It was for those reasons that I formed the view that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Stoneham & Sons; Durrant Cooper & Hambling.*

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LINES) AND OTHERS RESPONDENTS.

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[AND CROSS-APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF CANADA.

*Canada—New Brunswick—Constitutional law—Provincial highways—
Inter-provincial public motor bus service—Licensing—Subject to
exclusive Dominion legislative competence—Dominion power not*

* *Present:* LORD PORTER, LORD OAKSEY, LORD TUCKER, LORD ASQUITH OF BISHOPSTONE and LORD COHEN.

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impaired by provincial regulatory powers of control over its highways—Inter-provincial undertaking one and indivisible—Consequential power to carry purely intra-provincial passengers—“Works and undertakings”—To be read disjunctively—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91, 92 (10) (a)—Motor Carrier Act, 1937 (New Brunswick) (c. 43) (as amended), ss. 4, 11, 17.

Statute—Dominion—Validity. “Works and undertakings.”

By section 92 of the British North America Act, 1867: “In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say:— . . . (10) Local works and undertakings, other than such as are of the following classes:—(a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province: . . .”

The words “works and undertakings” in section 92 (10) (a) of the British North America Act, 1867, are to be read disjunctively, so that if either “works” or “undertakings” connect the province with others or extend beyond its limits the Dominion Parliament alone is empowered to legislate in respect of them, for that legislature has the same jurisdiction over the excepted matters specified in subsection (10) (a), (b) and (c) as it would have enjoyed if the exceptions were in terms inserted in one of the classes of subjects assigned to it under section 91 of the Act of 1867. Accordingly, where the Motor Carrier Board constituted under the Motor Carrier Act, 1937, of New Brunswick had granted a licence to the respondent, a resident of the United States of America, authorizing him to operate public motor buses from Boston, Massachusetts, through the province of New Brunswick on specified highways to Glace Bay in the province of Nova Scotia and return, “but not to embus or debus passengers in the province of New Brunswick,” it was not within the legislative powers of the province of New Brunswick by the Act of 1937 or regulations made thereunder, or within the powers of the Motor Carrier Board by the terms of the licence granted by it, to prohibit the respondent from carrying passengers from points outside the province of New Brunswick to points within the province and vice versa.

In re the Regulation and Control of Radio Communication in Canada [1932] A.C. 304, 315; 48 T.L.R. 235 applied.

City of Montreal v. Montreal Street Railway [1912] A.C. 333, at p. 342; 28 T.L.R. 220 considered.

Further, while the province admittedly made, maintained, controlled and regulated the use of the roads within the province, and had authority over them to that extent, nevertheless in the case of inter-provincial undertakings connecting one province with another and extending beyond the limits of the province the jurisdiction of the Dominion under section 92 (10) (a) could not be impaired by the province’s general right of control over its own roads. So to construe section 92 (10) (a) would destroy the efficacy

of the exception. Here the Motor Carrier Act or the licence or both combined had the effect of sterilizing the functions and activities of the respondent's undertaking in its task of connecting New Brunswick with both the United States of America and with the province of Nova Scotia, and were an interference with the prerogative of the Dominion. Whatever provisions or regulations a province might prescribe with regard to its roads, it must not prevent or restrict inter-provincial traffic; that did not in any way prevent what was in essence traffic regulation, but the provisions in the local statutes and regulations must be confined to such matters. In the present case they were not so confined, for the pith and substance of the provisions in question was not traffic regulation, but an interference with an undertaking connecting province and province, and therefore an incursion into the field reserved by the British North America Act to the Dominion.

Colonial Building and Investment Association v. Attorney-General for Quebec (1883) 9 App.Cas. 157; *Great West Saddlery Co. Ltd. v. The King* [1921] 2 A.C. 91; 37 T.L.R. 436; and *Lymburn v. Mayland* [1932] A.C. 318; 48 T.L.R. 231 considered.

Lastly, the respondent was not engaged in two enterprises, one within the province and the other of a connecting nature; his undertaking was in fact one and indivisible—an inter-connecting undertaking extending beyond the limits of the province, and therefore solely within Dominion jurisdiction under section 92 (10) (a)—and the respondent could not be prohibited, as part of that one undertaking, from taking up and setting down passengers whose journey both began and ended within the province. Whether there was an inter-connecting undertaking depended upon all the circumstances of the case.

Toronto Corporation v. Bell Telephone Company of Canada [1905] A.C. 52, 59; 21 T.L.R. 45 applied.

The words "other than such" in section 92 (10) of the British North America Act, 1867, do not mean "other than such *local*" "works and undertakings as are within the exceptions," but merely mean such works and undertakings as are within the categories thereafter set out.

Judgment of the Supreme Court of Canada [1951] S.C.R. 387 affirmed in part and reversed in part.

CONSOLIDATED APPEALS (No. 23 of 1952), by special leave, from a judgment of the Supreme Court of Canada (October 22, 1951), reversing a judgment of the Supreme Court of New Brunswick, Appellate Division (May 1, 1950), answering questions raised for the opinion of the court by order of Hughes J. in the Supreme Court of New Brunswick, Chancery Division (January 17, 1950).

The following introductory statement is taken from the judgment of the Judicial Committee: The problem with which the Board were confronted in the present appeal was concerned with the conflicting jurisdiction of the Parliament of Canada on

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the one part, and on the other part of the legislation and regulations of the province of New Brunswick made under its local Acts.

The parties immediately concerned were originally (1), as defendant, one Winner who resided in the United States of America and was in the business (inter alia) of operating motor buses for the carriage of passengers and goods for hire or payment from Boston through the State of Maine and the province of New Brunswick to Glace Bay in the province of Nova Scotia and intermediately, and (2) as plaintiff, the respondent S. M. T. (Eastern) Ltd., which held licences granted by the Motor Carrier Board of the province of New Brunswick to operate motor buses for hire or payment over certain highways, which need not be further specified, between St. Stephen and the City of St. John, both in New Brunswick.

In substance the plaintiff's claim was for an injunction against the defendant restraining him from embussing and debussing (taking up or setting down) passengers within the province of New Brunswick, and a declaration that he had no right to do so.

In his defence the defendant stated that he had in fact embussed and debussed passengers in the province and that he intended to continue doing so unless and until some court of competent jurisdiction should declare that he was legally debarred therefrom.

Upon these contentions Hughes J. of the Chancery Division of the Supreme Court of New Brunswick gave no decision, but propounded certain questions of law to be raised for the opinion of the Supreme Court of New Brunswick, Appellate Division. He further ordered that, for the purpose of that opinion, the facts relevant to the issues to be determined should be deemed to be those set out in his order. Those essential to the matter now in question were as follows:—

1. The plaintiff was a company incorporated under and by virtue of the New Brunswick Companies Act and was in the business (inter alia) of operating motor buses for the carriage of passengers and goods for hire or compensation over the highways of the province of New Brunswick.

2. The plaintiff held licences granted by the Motor Carrier Board of the province of New Brunswick to operate public motor buses between St. Stephen, New Brunswick, and the City of St. John, New Brunswick, over Highway Route No. 1, and between the City of St. John and the Nova Scotia border

over Highway Route No. 2, for the purpose of carrying passengers and goods for hire or compensation.

3. The plaintiff by its public motor buses maintained a daily passenger service over the routes set out in paragraph 2 hereof.

5.—(a) On June 17, 1949, on the application of the defendant the Motor Carrier Board granted a licence to the defendant, permitting him to operate public motor buses from Boston in the Commonwealth of Massachusetts through the province of New Brunswick on Highways Nos. 1 and 2 to Halifax and Glace Bay in the province of Nova Scotia and return, but not to embus or debus passengers in the province of New Brunswick after August 1, 1949. (b) At the time of making the application, the defendant challenged the validity of 13 George VI, chapter 47 (1949), and the Motor Carrier Act, 1937, as affected thereby, as being ultra vires of the legislature of the province of New Brunswick. (c) The Motor Carrier Board made no specific ruling on the defendant's challenge as set out in sub-paragraph (b), but acted under 13 George VI, chapter 47 (1949).

6. The defendant by his motor buses maintained a regular passenger service over the routes set out in paragraph 5 (a) hereof.

7. Since August 1, 1949, the defendant had continually embussed and debussed passengers within the province of New Brunswick and it was his intention to continue to do so unless and until it should have been declared by some court of competent jurisdiction that such operations were prohibited by the Motor Carrier Act, 1937, and amendments thereto, or by any other applicable statute or law.

8. The defendant intended to carry passengers not only from points without the province of New Brunswick to points within the said province and vice versa, but also, in connexion with and incidental to his operations as more particularly described in paragraph (9) hereof, to carry passengers from points within the said province to destinations also within the said province, unless and until it should have been declared by some court of competent jurisdiction that such operations were prohibited by the Motor Carrier Act, 1937, and amendments thereto, or by any other applicable statute or law.

9.—(a) The business and undertaking of the defendant consisted of the operation of motor buses for the carriage of passengers and goods for hire or compensation between the city of Boston in the Commonwealth of Massachusetts and the town

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of Glace Bay in the province of Nova Scotia and between intermediate points. (b) The business and undertaking was conducted by the defendant over that portion of its route which lay between the city of Boston and the town of Calais, Maine, under a certificate granted by Interstate Commerce Commission (a Federal commission of the United States of America having jurisdiction, inter alia, over inter-state transportation).

(d) The Motor Carrier Board of the province of New Brunswick, on June 17, 1949, on the application of the defendant as set forth in paragraph 5 hereof, purported to licence the operation of the defendant, in the province of New Brunswick, as follows:

“ Israel Winner doing business under the name and style of “ ‘ MacKenzie Coach Lines,’ at Lewiston in the State of Maine “ is granted a licence to operate public motor buses from Boston “ in the State of Massachusetts, through the province of New “ Brunswick on Highways Nos. 1 and 2, to Halifax and Glace “ Bay in the province of Nova Scotia and return, but not to “ embus or debus passengers in the province of New Brunswick “ after August 1, 1949.”

(e) The Board of Commissioners of Public Utilities for the province of Nova Scotia had purported to approve the defendant's operations in the province of Nova Scotia over the following routes: “ (a) New Brunswick border to Glace Bay, via Route “ No. 4—Wentworth Valley and Truro, 302 miles; (b) New “ Brunswick border to Glace Bay, via Route No. 2—Parrsboro and “ Truro, 319 miles; (c) New Brunswick border to Glace Bay, via “ Route No. 6—Pugwash, Wallace, Pictou and New Glasgow, “ 292 miles; (d) Truro to Halifax, 64 miles (3 miles of which is “ within the corporate limits of the town of Truro and city of “ Halifax).”

(f) Subsequently the Board of Commissioners of Public Utilities for the province of Nova Scotia amended the certificate granted to the defendant as set out in sub-paragraph (e) hereof as follows: “ Operation of this route is permitted To BE “ SUSPENDED from January 12, 1949, until May 1, 1949.”

(g) The defendant, in fact, operated as a public motor carrier between the city of Boston aforesaid, the town of Glace Bay aforesaid and intermediate points, in accordance with the timetable, a copy of which was hereunto annexed marked “ A,” between May 1 and December 15 in each year, the period of time covered by the certificates granted by the Interstate Commerce Commission.

(j) Incidentally to its operations as aforesaid, the defendant

proposed to pick up, within the province of New Brunswick, passengers and their baggage having a destination also within the province of New Brunswick.

The questions for the opinion of the Supreme Court of New Brunswick were: “ (1) Are the operations or proposed operations of the defendant within the province of New Brunswick, or any part or parts thereof as above set forth, prohibited or in any way affected by the provisions of the Motor Carrier Act, 1937, and amendments thereto, or orders made by the said Carrier Board? (2) Is 13 Geo. VI, chapter 47 (1949), intra vires of the legislature of the province of New Brunswick? ”

To those questions there was by agreement between the parties added what may be described as an enlargement of the first question, but may, perhaps, be more conveniently dealt with (as it was dealt with in the Supreme Court of New Brunswick) as forming a third question, viz.: “ (3) Are the proposed operations prohibited or in any way affected by regulation 13 of the Motor Vehicle Act, chapter 20 of the Acts of 1934, and amendments, or under sections 6 or 53 or any other sections of the Motor Vehicle Act? ”

The Supreme Court of New Brunswick, Appeal Division (Richards C.J., Harrison and Hughes JJ.) answered all the questions in the affirmative.

On appeal to the Supreme Court of Canada (Rinfret C.J., Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.) it was held by that court that, apart from intra-provincial traffic, the defendant's undertaking was excepted under section 92 (10) (a) of the British North America Act, 1867, from provincial legislative jurisdiction.

The Attorney-General for Ontario and others now appealed, and the defendant cross-appealed against the decision of the Supreme Court respecting the intra-provincial traffic.

1953. Nov. 4, 5, 9, 10, 11, 12, 16, 17 and 18. *Dana Porter Q.C.* (A.-G. for Ontario) and *C. R. Magone Q.C.* for the Attorney-General for Ontario, appellants. This appellant appeals against that part of the judgment of the Supreme Court which held that, apart from intra-provincial traffic, the defendant's undertaking was excepted under section 92 (10) (a) of the British North America Act, 1867, from provincial legislative competence. It is submitted that section 92 (10) (a) does not apply to this particular enterprise. There never has been any question that the province can control

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its highways; the real question is where is the dividing line to be drawn between legislation which relates to the control of highway traffic and legislation which in its pith and substance may relate to some undertaking or business which is not within the jurisdiction of the province. It is the provincial licence which gives Winner the right to use the highways. Throughout its history the province has had control of the highways, and the legislation here in question is, it is submitted, highway legislation. It is part of the whole policy and scheme which is to be found in every modern State that it has the power of dealing with traffic and roads. In New Brunswick, in Canada, and in Great Britain under the Road Traffic Acts, there is the same type of legislation, and the same policy expressed in different words. The surface of the highway is built by revenues raised by the provincial legislatures. If there is to be control, there must be the power to exclude certain types of vehicle or to limit the form of traffic.

There are three main propositions. First, whether or not Winner's operation is an undertaking within the meaning of section 92 (10) (a), it is contended that, by virtue of the powers of the province to control provincial highways and the traffic on them, the Motor Carrier Board had the power to grant or to refuse a licence to Winner. Neither the licence issued to him nor the condition attached to it was an attempt to regulate his business; it simply laid down conditions on which he might have the right to pass on the highways of New Brunswick. It really comes down to this: to what extent had the province a right to limit the right of passage on its own highways, paid for and made by it, and if it has not such right, who has? If the board had power to refuse a licence, then, it is submitted, it had power to attach any condition.

Secondly, whether or not Winner's business is an "undertaking," the provincial jurisdiction over the highways extends not only to the licensing of operations but to the regulation of those operations in all aspects. The power to regulate operations on the highways is in its pith and substance provincial. That power is also necessarily incidental to the control of the highways. Thirdly, Winner's business was not an "undertaking" or "a work and undertaking" within the exception meaning in section 92 (10) (a). The word "local" must be given some significance; there must be a locus. Those are the three main propositions.

With regard to the first proposition, the Motor Carrier Act related entirely and exclusively to operations within the province.

There is no such thing in Canada as an inter-provincial highway—every highway system is self-contained within the province. *Provincial Secretary of Prince Edward Island v. Egan*¹ is the most important case dealing generally with the question of provincial control of highways. So, generally speaking, highway traffic legislation is undoubtedly within provincial jurisdiction, and the question whether the Motor Carrier Act is within that class of legislation is something which has to be considered in light of the policies which have been adopted in legislation throughout the civilized world to deal with this type of problem: Road Traffic Act, 1930, s. 72 (Great Britain). The principle is the same in all this class of legislation which provides for the discretionary type of franchise licence in respect of motor-bus operations. The pith and substance of that general legislation is to provide for the control and use of the highways irrespective of what the origin of the people who seek to use them may be. Under that legislation the board has the power to deny a licence to any person who seeks to operate within the province even though he comes from outside. If, indeed, an operator wished to start his operations outside the boundaries of the province and could not be prevented under this Act from coming in and from using the highways, he would be in a higher position than operators who are entirely within the province. That would appear to be an anomalous situation.

There is nothing in section 92 (10) (a) which gives any right to the use of the highways. In this case there is no undertaking which connects anything until it gets the right to use highways. What has to be determined is what right did Winner have to operate on the highways of New Brunswick other than the right which was given to him under the legislation of that province. The pith and substance of this legislation is not directed to inter-provincial undertakings, but might only incidentally affect certain inter-provincial undertakings; that is the view which should prevail. *Ladore v. Bennett*² goes a long way to support the contention that while the legislation here in question may incidentally affect some possible inter-provincial operation, its pith and substance is to restrict and develop operations on the highways of New Brunswick. Winner's licence was subject to a condition that he could operate on those highways a through service. The licence and the condition are bound together and, if the latter is bad, then he had no licence at all and had no right to go on the highways. The province cannot give by its legislation rights

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¹ [1941] S.C.R. 396, 400-2.² [1939] A.C. 468; 55 T.L.R. 732.

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which the province cannot control and destroy. [Reference was made to *Great West Saddlery Co. v. The King*,³ *Colonial Building and Investment Association v. Attorney-General of Quebec*⁴ and *Lymburn v. Mayland*.⁵]

One comes back to the question whether the right of passage can be restricted and limited by the provincial legislature. There is no public common law right of passage over provincial highways applying to citizens throughout the length and breadth of Canada which extends beyond the powers of the provincial legislature. Where a provincial highway is created by statute, then the rights which flow from that creation may be limited or dealt with in any way by the legislative body which creates those rights and which is entirely sovereign within its jurisdiction. The Motor Carrier Act is provincial in its scope and purpose, and is in its terms entirely within the jurisdiction of the province to pass, so that if there is any possible way in which the Federal Parliament might conceivably act under section 92 (10) (a) as an incidental effect, that is a matter with which the province is not really concerned. In Quebec there never was any common law as regards public right of passage on a highway similar to the common law of England; so there cannot be any general common law right in Canada if one province is left out, and it must be general if it is to be the common law. Before confederation the highways belonged to the Crown, and the public entered them not as of right but at the pleasure of the Crown.

With respect to the suggestion that certain rights flow from citizenship itself, what the Supreme Court appears to have overlooked in dealing with the rights which flow from citizenship is the federal character of the union; and there are certain types of civil rights, except those which are expressly excluded, which are dealt with entirely by the provinces. Canada is no less one Dominion merely because there is a division of powers. The argument based on citizenship on the facts of this case seems to be somewhat far removed from the issue. [Reference was made to *Hydro-Electric Power Commission of Ontario v. County of Grey*.⁶] It was decided in *City of Montreal v. Montreal Street Railway*⁷ that there should not be, could not be, and was not, any dual control of the traffic on the provincial railway. In that case through traffic which went over a provincial line was dealt

³ [1921] 2 A.C. 91; 37 T.L.R. 436.⁶ (1924) 55 O.L.R. 339.⁴ (1883) 9 App.Cas. 157, 166.⁷ [1912] A.C. 333, 344; 28 T.L.R.⁵ [1932] A.C. 318, 324; 48 T.L.R. 220.

with; the present case is concerned with through traffic going over a provincial highway, and it is submitted that if the judgment in the *Montreal Street Railway* case⁷ was right as to the facts, then a fortiori in the present case, dealing with a highway which is provincial in its inception, controlled by provincial legislation, laid down under provincial legislation, maintained by provincial funds, paid for out of the revenues derived from the province, any through traffic which goes over that highway is subject to the provincial jurisdiction just as it was in the railway case.

If the province has the right to provide for licences of the kind in question here, discretionary licences as to the use of the highways, then, if the authority set up under the Act has power to attach or specify conditions in any such licence, it really does not matter whether the condition itself deals with some matter which could not properly be dealt with by provincial legislation: an analogous authority on this point is *Brooks-Bidlake and Whittall Ltd. v. Attorney-General for British Columbia*⁸; that case was distinguished in *Attorney-General of British Columbia v. Attorney-General of Canada*.⁹

On the first main proposition, therefore, this licence is one from which Winner derived his sole right to pass upon the highways, and it is within the competence of the province. The right of Winner to carry on his business on the highway of the province was subject to a valid condition in a licence granted to him pursuant to competent provincial legislation.

The second main proposition is that even though the condition in this particular licence and the licence itself might be construed as a regulation in the broad sense of persons on the highways rather than merely a licence to give this operator the right to pass on the highways, it is nevertheless submitted that the province had full power to regulate any operation on the highways, especially by mechanical vehicles of this kind. That is all that need be added to what has already been said in support of this proposition.

With regard to the third proposition—whether this is an “undertaking”—we are prepared, without abandoning the point, to adopt the grounds which Mr. Wilson will urge in support of that proposition.

H. J. Wilson Q.C. for the Attorney-General for Alberta, appellant. It is submitted, first, that the business of the respondent Winner is not a “work and undertaking” connecting New

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⁷ [1912] A.C. 333, 344.⁹ [1924] A.C. 203, 208; 40 T.L.R. 4.⁸ [1923] A.C. 450; 39 T.L.R. 220.

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Brunswick with any other province or extending beyond the limits of the province, and therefore does not come within the exception mentioned in section 92 (10) (a) of the Act of 1867. Secondly, and alternatively, if Winner's business does come within the exception in section 92 (10) (a), nevertheless the licence granted to him under the Motor Carrier Act of New Brunswick is effective and binding on him under subheads (5), (9), (10), (13) and (16) of section 92 of the Act of 1867, because legislation which in pith and substance falls within one or more of the subheads of section 92 may incidentally affect matters over which the Parliament of Canada has jurisdiction under section 91. It is not proposed to submit any argument on the occupied field. If the business comes within section 92 (10) (a) then it is under Dominion jurisdiction. If in pith and substance this legislation of New Brunswick comes within one or more of the subheads of section 92, if that is its true nature and character, then it is of no consequence that it does affect in some respects matters which come under some subhead of section 91. This being an exception to local works and undertakings must be strictly interpreted; it is in derogation of a right specifically given to the provinces.

If "works and undertakings" may be read as "works or "undertakings" the situation is that if there is a work irrespective of an undertaking connecting one province with another, then it is under Dominion jurisdiction. It is submitted that that is not so. "Works and undertakings" have to be taken as a whole and cannot be split up. The matter must be looked at as an integrated whole, and both the works and undertaking must connect. With regard to "and" and "or," see *Mersey Docks and Harbour Board v. Henderson Brothers*.¹⁰ The word "works" is defined in *City of Montreal v. Montreal Street Railway*¹¹; and in *In re Regulation and Control of Radio Communications in Canada*¹² Lord Dunedin, giving the judgment of the Board and referring to the word "undertaking," said: "Undertaking is not "a physical thing, but is an arrangement under which of course "physical things are used." In *Canadian Pacific Railway Co. v. Attorney-General for British Columbia*¹³ there was an undertaking which might be said to stretch across the provinces, but the works did not connect, being separate hotels, and therefore it did not come within the exception in section 92 (10) (a). Looking

¹⁰ (1883) 13 App.Cas. 595, 607, 610.

¹¹ [1912] A.C. 333, 342; 28 T.L.R. 220.

¹² [1932] A.C. 304, 315.

¹³ [1950] A.C. 122; 66 T.L.R. (Pt. 1) 34.

at the undertaking in the present case as a whole, it consists of buses plus the intention of running them; the highway is the connecting link and that is no part of Winner's undertaking.

Another illustration in support of the submission that "undertaking" cannot be taken alone is *Rex v. Eastern Terminal Elevator Co.*,¹⁴ which indicates that there must be not only the works connecting but the undertaking connecting as well. Merely because a milk business operates back and forth across a provincial boundary, could it be suggested that that comes within the jurisdiction of the Dominion Parliament? With regard to the *Radio Communication* case,¹⁵ it is conceded that that part of the judgment which dealt with the meaning of the word "undertaking" is against the appellants in this case, but it is submitted that the Board in that case did specifically say that it was a telegraph, and if it was it came within the enumerated head expressly excluded from section 92. That case can be distinguished in its facts from this case; and secondly, in a later case, *Attorney-General for Canada v. Attorney-General for Ontario*,¹⁶ Lord Atkin, giving the judgment, put the *Radio* case¹⁷ on a ground from which this appellant takes some comfort: "The true ground of decision was "that the convention in that case dealt with classes of matters "which did not fall within the enumerated classes of subjects in "section 92, or even within the enumerated classes in section 91."

If one were to construe those words "works and undertakings" disjunctively, and not as an integrated whole, that construction would be so wide that it would go a long way to destroy the autonomy of the provinces. It must have been intended that the phrase should have the narrower construction. It is conceded that the Dominion may provide for inter-provincial traffic; but when a carrier comes to our province and wants a licence to use our highways the provincial legislature has the right to say in what way and how he shall use the highways. If the province cannot prevent a person from Maine embussing and debussing passengers in New Brunswick, then he would be in a better position than the citizens of New Brunswick. The province can make legislative provisions covering all persons wherever they may come from. These highways are "local works and undertakings" in the province within the meaning of head (10) of section 92.

It must be re-emphasized that in this case this appellant is

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¹⁴ [1925] S.C.R. 434, 452.

¹⁵ [1932] A.C. 304.

¹⁶ [1937] A.C. 326, 351; 53 T.L.R. 325.

¹⁷ [1932] A.C. 304.

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not relying entirely on "property and civil rights" and "matters" of a local and private nature," but also on subheads (5), (9) and (10), and asks the Board to consider this matter from the point of view of proprietary rights: *Reference re Waters and Water Powers*.¹⁸ The Dominion could not interfere with the title to the highways unless by expropriation or something of that kind.

It is proposed next to refer to the London Resolutions which preceded the passing of the British North America Act, 1867; although their evidential value may be slight, it is submitted that the resolutions are admissible.

C. F. H. Carson Q.C. for the respondent Winner. The Board refused to look at a draft bill in *Attorney-General for Canada v. Hallet & Carey Ltd.*¹⁹

[After their Lordships had conferred among themselves, Lord Porter announced that their Lordships were persuaded that the material was not only of little evidentiary value but was not even admissible.]

H. J. Wilson Q.C. There is a close analogy in this case to *Shannon v. Lower Mainland Dairy Products Board*.²⁰ This Motor Carrier Act deals entirely with the licensing of people and the transporting of goods and passengers within the province, and, although it may incidentally affect people coming from outside, the true nature and character of the Act is to regulate within the province and to licence within the province persons who seek to use the highways of New Brunswick. The province has complete plenary power over its highways, and this case is concerned with what the province can do with its own property. The ownership and control of highways constructed by the province are within the exclusive jurisdiction of the province, and any user of those highways must be subject to conditions fixed by the province and subject to provincial control in every respect.

W. E. Darby Q.C. (A.-G. for Prince Edward Island) and *J. O. C. Campbell Q.C.* for the Attorney-General for Prince Edward Island, appellant.

Campbell Q.C. In the case filed by Prince Edward Island a slightly different attitude is adopted in that it is admitted that Winner had a work and undertaking. But our strongest argument is founded on the pre-eminent claims of section 92 as to the right of the province to deal in any way with highways or undertakings which have to do with highways. Control of highways, and

¹⁸ [1929] S.C.R. 200, 224.

²⁰ [1938] A.C. 708; 54 T.L.R. 1090.

¹⁹ [1952] A.C. 427, 433; [1952] 1 T.L.R. 1408.

regulation of traffic thereon, is within the exclusive jurisdiction of the provinces; and motor buses proceeding along such highways are exclusively subject to provincial law. The *Radio* case²¹ and *In re Regulation and Control of Aeronautics in Canada*²² cannot be read together with the present case: the judgment in the *Radio* case²¹ is based on the pre-eminent claims of section 91; in the present case the claim of the province is based on the pre-eminent claims of section 92. [Reference was also made to *Egan's case*.²³] A divided control between provinces and Dominion could only lead to confusion and inefficiency: divided control in connexion with highways would be much more serious than this Board found in the *Radio* case.²⁴

John F. H. Teed Q.C. for the Attorney-General for New Brunswick and ex rel. S. M. T. (Eastern) Ltd., respondent. The submissions are: (1) That the Motor Carrier Act is general in character and operates with respect to and affects all persons—aliens and citizens—when within the province. (2) Winner's operations will not in any event constitute a "work and undertaking" which had come under Dominion jurisdiction to the exclusion of provincial legislative jurisdiction. (3) Even if they could come under Dominion legislative jurisdiction, there is in fact no such legislation—it is conceded that there is not. No reference is made in the British North America Act to roads and highways as such—they are in the schedules to the Act. [*John Deere Plow Co. Ltd. v. Wharton*²⁵ was referred to.] A road once laid out and constructed is a "work"; and a provincial road is unquestionably a local work, and local works and undertakings are assigned to the exclusive legislative jurisdiction of the province. There is, it is submitted, no road which connects New Brunswick with another province, because each road ends at the boundaries of the province.

All the highway legislation of New Brunswick before confederation contained some prohibitory provisions with respect to the user, and the Motor Vehicle Act, 1934, and the Motor Carrier Act also each contains some provisions prohibiting the use of the highways under certain conditions and for certain purposes. Winner as an international operator of an undertaking has no rights within Canada except such as are given to him by the law of the provinces or of the Dominion. And if there is no Dominion power—and on the subject of motor carriers there is no Dominion law—then with

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²¹ [1932] A.C. 304.²² [1932] A.C. 54.²³ [1941] S.C.R. 396, 402, 415.²⁴ [1932] A.C. 304.²⁵ [1915] A.C. 330, 338.

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respect to those portions of his operations which are within each of the provinces he is subject to the provincial law, whatever it may be.

The word "works" means physical things, constructed to remain fixed in position: the illustrations are railways, canals and telegraph lines. The word "and" is conjunctive, and the expression "and undertakings" is used as joined to the works. The undertakings as added or joined to the works are tangible things which are properly essential or incidental to the operation of the works, and intangible things involved in the operation: the expression "and undertakings" adds both. As an antithesis, the word "works" in head (10) and (10) (a) and (c) does not mean or include physical things constructed to be mobile; buses or motor carriers are never a "work" within the meaning of the exception. The proposition, then, is that because motor-vehicles are not "works" within head (10) or (10) (a) the operation of mobile vehicles does not constitute an undertaking within the heading or exception unless there is also a work within the heading and exception and the operation of the vehicles is essential or properly incidental to the operation of the works. [Reference was made to *Wickham v. New Brunswick and Canada Railway Co.*²⁶] If the words are to be construed disjunctively, it is submitted that the undertaking did not in the contemplation of those who used the expression include the user of transportation vehicles on the roads of a province. With regard to legislation enacted "in relation to" a matter and legislation which merely "affects" something, the classical example is *Bank of Toronto v. Lambe*.²⁷

L. Tremblay Q.C. for the Attorney-General for Quebec, respondent. If there is the slightest reasonable doubt, then the judgment in this case must go in favour of the province: the *Aeronautics* case.²⁸ Winner's undertaking is not a "work" or an "undertaking"—taking them disjunctively—in the meaning in which those terms are used in section 92 (10) (a). It was not intended to include within (10) (a) all and every work and undertaking connecting one province with another or extending beyond the limits of the province, because if it had been intended to include all such works and all such undertakings the four particular works and undertakings need not have been mentioned; it need only have said "works and undertakings," and that would have included those four. The intention was to limit the works and

²⁶ (1865) L.R. 1 P.C. 64.

²⁸ [1932] A.C. 54, 70.

²⁷ (1887) 12 App.Cas. 575; 3 T.L.R.

undertakings to those similar to the four which have been specified. [Reference was made to *John Deere Plow Co. Ltd. v. Wharton*.²⁹] All that Winner needs to carry out his schedule are three buses; it cannot be right to say that that is a matter which should be given to the Federal Government to deal with.

F. P. Varcoe Q.C. and *Frank Gahan Q.C.* for the Attorney-General for Canada, respondent. It is sought to support two propositions. First, Winner's undertaking is within the exclusive jurisdiction of the Dominion Parliament as being an undertaking connecting New Brunswick with Nova Scotia and extending beyond the limits of New Brunswick into the United States of America within the meaning of head (10) (a) of section 92. Secondly, a prohibition imposed by a New Brunswick law against the picking up and setting down of passengers by Winner's undertaking is a law in relation to that undertaking and is ultra vires since such a law is within the exclusive jurisdiction of the Dominion Parliament.

The allocation of legislative powers in sections 91 and 92 of the Act of 1867 is an interlacing system. With regard to the phrase "works and undertakings" in head (10) of section 92, the Dominion is not saying that "or" should be substituted for "and"; in legislation such as this, dealing with an enumerated series of matters, "and" is invariably used—it is the proper drafting form. The following cases before the Privy Council relating to head (10) (a) undertakings show how the jurisdiction between the provinces and the Dominion is divided in the case of such undertakings: *Canadian Pacific Railway v. Corporation of the Parish of Notre Dame de Bonsecours*,³⁰ *Madden v. Nelson and Fort Sheppard Railway*,³¹ *Toronto Corporation v. Bell Telephone Company of Canada*,³² *Toronto Railway Co. v. Toronto City*³³ and *Luscar Collieries v. McDonald*.³⁴ If the legislature of the province passed an Act which, if there were a (10) (a) undertaking in existence, would prevent that undertaking from operating in the province, it is submitted that that legislation would be invalid. In other words, one does not have to wait for the (10) (a) undertaking to get going before it can be said that the legislative scheme is invalid. The whole tenour of the decisions is to distribute the legislative powers in an interlacing manner, and it cannot be said that any subject-matter is in a water-tight compartment: *Attorney-General for Manitoba v. Attorney-General*

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²⁹ [1915] A.C. 330, 338.³² [1905] A.C. 52; 21 T.L.R. 45.³⁰ [1899] A.C. 367.³³ [1920] A.C. 426, 438.³¹ [1899] A.C. 626; 15 T.L.R. 484.³⁴ [1927] A.C. 925; 43 T.L.R. 801.

J. C. *for Canada* ³⁵; *Attorney-General for Ontario v. Attorney-General for the Dominion*.³⁶

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The following are some of the principles which have been adopted by the Privy Council in connexion with such a problem as the present: (1) Any subject-matter of legislation which cannot be found in section 92 falls in section 91 under "peace, order and "good government"; *Attorney-General for Alberta v. Attorney-General for Canada*.³⁷ (2) The test to be applied when there is any question of ultra vires is that the true nature and character of the legislation—its pith and substance—has to be ascertained. The Dominion is particularly concerned with that principle here, because it is submitted that the pith and substance of the legislation in question is legislation in relation to (10) (a) undertakings and within Dominion power, and not to highway traffic regulation, which is within provincial jurisdiction. With regard to the suggestion that outsiders might be better off than citizens of the province if this appeal is not allowed, the answer is that regulation, if there is to be any, should be applied by the Dominion Parliament and not by local legislatures. When the board made it a condition that Winner should not embus or debus passengers within the province it was not a provision which related to highways. The Motor Carrier Act is a law in relation to transportation undertakings and is not a law in relation to the regulation of highway traffic as such. This appeal should be dismissed.

C. F. H. Carson Q.C. for Israel Winner, Canadian National Railway Company, and Canadian Pacific Railway Company, respondents. There are only two questions involved in the appeal: (1) whether Winner's undertaking is within the exclusive authority of the provincial legislature or is within the exclusive authority of the Parliament of Canada; (2) if Winner's undertaking is within the exclusive authority of the Dominion Parliament, is the provincial legislation of New Brunswick as applied to Winner's undertaking in pith and substance in relation to that undertaking, or is it in relation to a subject within the exclusive legislative authority of the Province.

On the first question, it is submitted that his undertaking comes within the exclusive legislative authority of the Parliament of Canada because it is a (10) (a) undertaking. Winner's bus operation is just as much an inter-provincial and inter-national

³⁵ [1929] A.C. 260, 268; 45 T.L.R. 146.

³⁶ [1896] A.C. 348, 371; 12 T.L.R. 388.

³⁷ [1943] A.C. 356, 371; 59 T.L.R. 160; [1943] 1 All E.R. 240.

undertaking as is the operation of a railway from points in New Brunswick to points in Nova Scotia and between points in New Brunswick to points in the United States. There must be both works and undertaking to give the Dominion jurisdiction. Both railway and bus transport undertakings are modes of transport for carrying passengers and goods; both are providing substantially similar services to the public.

Coming to question (2) (*supra*), Mr. Varcoe's submission on this head is adopted—that this New Brunswick law as applied to Winner's undertaking is in pith and substance in relation to that undertaking and not in relation to a provincial subject-matter. A good deal has been said by the appellants here about provincial legislation of general application, and they sought to apply authorities to a case of this kind where the Motor Carrier Act is admittedly of general application to all motor carriers. The answer to that argument is to be found in the *Manitoba* case.³⁸ This Motor Carrier Act bears a striking similarity to the sort of provisions one finds in the Dominion Railway Act. In pith and substance this particular statute is not in relation to highways. Applying the reasoning of *Attorney-General for Alberta v. Attorney-General for Canada*,³⁹ the New Brunswick legislature has purported to authorize the Motor Carrier Board to prohibit the operation of a (10) (a) undertaking, and legislation of that character is ultra vires the province and within Dominion jurisdiction. The present case is a clearer case than the *Alberta* case.³⁹ [Reference was also made to the *Bell Telephone Company* case.⁴⁰] The appeal should be dismissed.

With regard to the cross-appeal, it is directed to the second part of the answer given by the Supreme Court—that it is within the legislative powers of the province to prohibit Winner by his undertaking from carrying passengers from place to place within the province incidentally to his other operations—and there are three propositions of principle which are appropriate: (1) In the case of an undertaking coming within head (10) (a) of section 92 it is not competent for a provincial legislature to interfere with the operations or proposed operations of that undertaking or part of it in the province. (2) Provincial legislation purporting to impose such an interference would be ultra vires as being legislation in relation to a (10) (a) undertaking. (3) In the case of such an undertaking it is not competent for a provincial legislature to

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³⁸ [1929] A.C. 260; 45 T.L.R. 146.⁴⁰ [1905] A.C. 52, 57, 59; 21 T.L.R.³⁹ [1939] A.C. 117, 131; 55 T.L.R. 45.

65; [1939] 1 All E.R. 423.

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interfere with the local business of the undertaking where such local business forms part of one single undertaking. The authority relied on in support of those propositions is the *Bell Telephone Company* case ⁴⁰; it is authority that Winner's undertaking is one single (10) (a) undertaking. See also the *Radio* case.⁴¹ In the light of those cases it is clear that if there is one single undertaking comprising inter-provincial business so as to come within (10) (a), and another branch of such business is intra-provincial, such an undertaking is in its entirety within the exclusive legislative authority of the Parliament of Canada. In the present case no valid distinction is to be drawn between the inter-national and inter-provincial branch, and the intra-provincial branch, unless these two branches or heads constitute two separate undertakings. It is submitted that they are one.

The question on the cross-appeal is: is Winner's carriage of intra-provincial traffic along his inter-national and inter-provincial route a separate undertaking so as to be outside the undertaking which, under section 92 (10) (a), is under the sole legislative jurisdiction of the Dominion Parliament and so as to be a local undertaking within provincial legislative competence? The only answer which can be given to that question on this Record is "No." If the appeal succeeds it is conceded that the cross-appeal fails; if the appeal fails, the cross-appeal should succeed. So far as the carriage of Winner's intra-provincial traffic is concerned, it is the same undertaking as his inter-provincial and inter-national. An inter-provincial ship or bus undertaking is not split into separate undertakings by provincial boundaries. The local undertaking is linked up with the inter-provincial undertaking so as to form one system, and the local undertaking so comes under the jurisdiction of the Dominion Parliament. [Reference was made to *Luscar Collieries v. McDonald*.⁴²]

The determination of the question in the cross-appeal is of some considerable concern to the two railway company respondents. Winner has never claimed an unqualified right, free from provincial legislation, to carry passengers between two points within the province not connected with his inter-national and inter-provincial undertaking. If he did that it would be a separate undertaking. The only relevant question is, what is the undertaking? It is important that this Board should consider whether the principle of the *Bell Telephone Company* case ⁴³ is to be

⁴⁰ [1905] A.C. 52.⁴¹ [1932] A.C. 304.⁴² [1927] A.C. 925, 932; 43 T.L.R. 801.⁴³ [1905] A.C. 52; 21 T.L.R. 45.

applied to this case or whether the test which the judges of the Supreme Court have suggested is the right one. Both in principle and on authority the whole undertaking comes under the jurisdiction of the Dominion Parliament whatever purely local elements it may contain. There is nothing in the facts here to support the view that there were here two separate undertakings—intra-provincial and inter-provincial.

There can be no difference in principle between any undertakings specifically mentioned in (10) (a), such as railways and telegraphs, and one the subject-matter of which comes within the meaning of (10) (a). The proper test is whether the particular undertaking under consideration is a connecting undertaking, and, if it is, it is immaterial that the local traffic is part of that undertaking. "Severability" is not the test. The establishment of stations for railways is not a relevant distinction; and in any case buses must have places to stop at. The appeal as against Winner should be dismissed, with costs, and the cross-appeal should be allowed, with costs. Costs are not asked for against the respondent railway companies either on the appeal or the cross-appeal, because they are interveners.

F. P. Varcoe Q.C., in submitting on behalf of the Attorney-General for Canada that the cross-appeal should be allowed, adopted Mr. Carson's argument.

J. A. Y. MacDonald Q.C. and *Ralph Millner* for the Attorney-General for Nova Scotia, respondent. The position taken by Nova Scotia was, and still is, that the legislation here in issue is for the most part valid, but that in so far as it relates to inter-national or inter-provincial transportation it is invalid and ultra vires the provincial legislature. The decision of the Supreme Court of Canada is supported, and it is submitted that both the appeal and the cross-appeal should be dismissed. The first proposition is that, except as to regulation 13 (made under the Motor Vehicle Act, 1934), that Act of 1934 and the regulations made thereunder are legislation in respect of highways and highway traffic, are of general application and are therefore intra vires the legislature of New Brunswick. The second proposition, which is closely related, is that, except as to the condition imposed in the licence granted to Winner, the provisions of the Motor Carrier Act and the orders and regulations made thereunder are legislation of general application in relation to highways and to the intra-provincial transportation of passengers and goods and are consequently intra vires the province and validly effective. Regulation 13 by its

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terms has application to, and only to, an inter-provincial or inter-national operation; there is no authority under that regulation to impose conditions of general application. In so far as regulation 13 is legislation in relation to inter-provincial or inter-national transportation as such it is ultra vires the province. The condition imposed in Winner's licence is in relation to inter-provincial or inter-national operations and is also therefore ultra vires.

With regard to section 92 (10) (a), it is submitted that the phrase "works and undertakings" as there used is descriptive of those works and undertakings which by their nature are susceptible to or capable of effective legislation or regulation on the part of a provincial legislature of limited territorial jurisdiction, and in contrast to inter-national or inter-provincial or non-local works and undertakings which by their nature are not susceptible to effective legislation on the part of the provincial legislature. "Local" means subject to effective legislation by a provincial legislature. For the decision of this case all that it is necessary for this Board to decide is that the condition applying to the licence is not within the powers of the province. The province cannot make a law "in relation to" that undertaking, though it may be "affected" by all sorts of laws of the province. The Board may find that this particular condition is ultra vires the province by reason that the power to impose it is not conferred on the province by any head of section 92; that is all that is necessary to the decision, and it is submitted that the decision should be confined to that point. The question in *Canadian Pacific Railway Co. v. Attorney-General for British Columbia*⁴⁴ was what was the extent of the railway undertaking; and in the *Bell Telephone Company* case⁴⁵ the undertaking was defined by the Act of incorporation and, secondly, by the nature of the physical performance. With regard to the intra-provincial business being severable and within provincial legislative competence, the judgment of the Supreme Court is supported and adopted.

Dana Porter Q.C., in reply, stated that he was authorized to reply for all the appellants. The main issue is as to the pith and substance of the law in question. One of the grounds on which Mr. Wilson said that highways were exclusively within provincial jurisdiction was that they were local works and undertakings; and there are other grounds—property and civil rights. The submission is that the subject-matter of the legislation is the

⁴⁴ [1950] A.C. 122, 143; 66 T.L.R. ⁴⁵ [1905] A.C. 52; 21 T.L.R. 45.
(Pt. 1) 34.

control, regulation and use in all aspects of the highways in New Brunswick. That is the pith and substance of the legislation, and what was done under the statute was entirely within the powers of the provincial board in that connexion. The question is whether this is highway legislation in the ordinary way, or legislation directed to transport. It is submitted that transportation and highways are so completely interwoven with the control of highways that it is difficult to separate the two. Highways are local works within the province and therefore within the exclusive control of the province, and the right to restrict certain people from going on those highways is entirely provincial.

There is no real analogy between a railway and a bus operator; the latter is in a different situation; there is no inter-provincial work. The whole question comes down to the control of a local work. The highway is a local work which does not cross the boundary. "Connecting work" within the meaning of the section is one which crosses the boundaries of the province. Where two roads in different provinces combine they are not a connecting work. A railway has no power to cross a highway, and can only do so by permission of the province, which can impose conditions, such as erecting a gate. Section 92 (10) (a) gives Winner no power to enter upon the highways of New Brunswick except upon the terms imposed by the provincial authority. *British Columbia Electric Railway Co. v. Vancouver, Victoria and Eastern Railway and Navigation Co.*⁴⁶ deals with the subject-matter of ancillary powers; some approbation was given to the dissenting judgment of Duff J. when the decision was reversed by the Privy Council.⁴⁷ [Reference was also made to *Attorney-General for Alberta v. Attorney-General for Canada*.⁴⁸] If the Dominion Parliament at any time attempts to exercise powers under section 92 (10) (a) which might by ancillary or incidental powers give rights of passage over a local work—a highway—it is submitted that that legislation would be ultra vires unless it were ancillary or incidental to the exercise of powers with respect to an inter-provincial undertaking. And further, no matter what the scope of the inter-provincial undertaking may be, it would not be necessary to give any rights over a provincial highway by legislation of that kind, and for two reasons: (i) the Dominion Parliament could provide for inter-provincial highways which would be connecting works; or (ii) the Dominion Parliament could declare a provincial

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⁴⁶ (1913) 48 S.C.R. 98, 114.

⁴⁷ [1914] A.C. 1067, 1076.

⁴⁸ [1939] A.C. 117; 55 T.L.R. 65;
[1939] 1 All E.R. 423.

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highway, if it considered necessary, to be a work for the general advantage of Canada, and thereby acquire control over it. So long as that method is properly open, it is not necessary to provide for any running rights over provincial works such as highways.

Summarizing: (1) A Dominion railway undertaking in all its aspects is inseparably identified with a connecting work under section 92 (10) (a), and by the Railway Act is subject to a declaration under section 92 (10) (a). (2) An inter-provincial motor carrier undertaking depends for its very existence on licences to use provincial highways, which are property within the province—local works under section 92 (10). It thus becomes identified with local works and not connecting works. (3) No motor carrier may use a highway as of right. (4) The respondents in this case do not rely on any general public right of passage, but rely entirely on section 92 (10) (a). (5) Section 92 (10) (a) confers in its terms no right to use a local work. (6) The Federal Parliament has passed no law under section 92 (10) (a) purporting to confer any power to use highways. (7) Parliament has not authorized the construction of federal highways—inter-provincial highways. (8) Parliament has made no declaration as to highways under section 92 (10) (a). (9) The condition of Winner's licence relates to the use of highways and, even if it does not, it is a condition subject to which the right to use a highway is given. (10) The contention of the respondents necessarily implies the right of Parliament under section 92 (10) (a) to exercise control over a local work under section 92 (10) constructed by the province.

As to the cross-appeal, and the intra-provincial operations, the jurisdiction of the province is plenary. "Undertaking" has been defined very loosely in certain aspects: the *Radio* case⁴⁹; *Canadian Pacific Railway Co. v. Attorney-General for British Columbia*.⁵⁰ In the *Bell Telephone Company* case,⁵¹ which was relied on by the cross-appellant, there was the one work, which was inter-provincial, just as a railway, and was under the control of the Dominion legislature. The *Luscar Collieries* case⁵² really does not assist on the issue in this case. On this part of the case the Supreme Court was right.

C. F. H. Carson Q.C. in reply on the cross-appeal. There was one single undertaking. [Reference was made to the *Bell*

⁴⁹ [1932] A.C. 304.

⁵⁰ [1950] A.C. 122; 66 T.L.R. (Pt. 1) 34.

⁵¹ [1905] A.C. 52; 21 T.L.R. 45.

⁵² [1927] A.C. 925; 43 T.L.R. 801.

Telephone Company case,⁵³ the *British Columbia Electric Railway* case,⁵⁴ and to *Toronto Railway Co. v. Toronto City*,⁵⁵ where the Privy Council took a different view from Duff J. in the *British Columbia Electric Railway* case⁵⁴; and on the question of costs on the cross-appeal to *Attorney-General for Quebec v. Nipissing Central Railway Co. and Attorney-General for Canada*.⁵⁶]

C. R. Magone Q.C. for the Attorney-General for British Columbia, appellant.

S. M. T. (Eastern) Ltd., Maccam Transport Ltd. and Carwill Transport Ltd. did not lodge cases and were not represented.

1954. Feb. 22. The judgment of their Lordships was delivered by LORD PORTER, who stated the facts set out above and the questions for the opinion of the Supreme Court of New Brunswick, and continued: In order to appreciate the basis upon which it was thought necessary to make those inquiries, it is essential to set out a number of the provisions of the relevant Acts, but their Lordships have not thought themselves required to deal with the third question or to transcribe any portion of the Motor Vehicle Act of 1934, since admittedly no action has been taken under that Act and, moreover, as the Supreme Court of New Brunswick have pointed out, the principles upon which any questions arising under that Act are to be determined involve considerations similar to those applicable to the case of the Motor Carrier Act. Nor have their Lordships considered it desirable to set out the whole of the latter Act. Essential sections have alone been transcribed. The bearing of other sections can best be dealt with where they affect the argument, and the amendments of the Motor Carrier Act which have been made from time to time can best be treated in the same way.

The provisions which their Lordships feel constrained to set out are as follows: “(2).—(1) In this Act unless the context “otherwise requires:—(a) ‘Board’ means the Motor Carrier Board “as hereinafter constituted. (b) ‘Licence’ means a licence “granted to a motor carrier under this Act. (c) ‘Licensed Motor “‘Carrier’ means a motor carrier to whom a licence has been “granted by the board under this Act. . . . (e) ‘Motor Carrier’ “means a person, firm or company that operates or causes to be “operated in the province a public motor bus or a public motor

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⁵³ [1905] A.C. 52; 21 T.L.R. 45.⁵⁵ [1920] A.C. 426.⁵⁴ (1913) 48 S.C.R. 98; [1914] A.C.⁵⁶ [1926] A.C. 715; 42 T.L.R. 591.

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" truck. (f) ' Public Motor Bus ' means a motor vehicle plying
" or standing for hire by, or used to carry, passengers at separate
" fares [am. 1939, c. 37, 1949, c. 47.] (h) ' Regulations ' mean
" and include the rules and regulations and general orders made
" by the board under this Act.

" 3.—(1) The members of the Board of Commissioners of
" Public Utilities are hereby constituted a board for the purposes
" of this Act and shall be known as the Motor Carrier Board.
" The chairman and secretary of the said Board of Commissioners
" of Public Utilities shall be, respectively, the chairman and
" secretary of the Motor Carrier Board. (2) In the absence of
" any member of the board from a regularly constituted meeting
" thereof the secretary shall sit and perform the duties of a
" member of the board. (3) Without limiting any powers, duties,
" authority or jurisdiction conferred or imposed by this Act, all
" powers, duties, authority and jurisdiction as are vested in the
" Board of Commissioners of Public Utilities for common carriers
" are hereby vested in the board over motor carriers except as
" otherwise specifically provided in this Act.

" 4. The board may grant to any person, firm or company a
" licence to operate or cause to be operated within the province
" public motor buses or public motor trucks over specified routes
" or between specified points.

" 5.—(3) In determining whether or not a licence shall be
" granted, the board shall give consideration to the transportation
" service being furnished by any railroad, street railway or licensed
" motor carrier, the likelihood of proposed service being permanent
" and continuous throughout the period of the year that the high-
" ways are open to travel and the effect that such proposed
" service may have upon other transportation services. (4) If the
" board finds from the evidence submitted that public convenience
" will be promoted by the establishment of the proposed service,
" or any part thereof, and is satisfied that the applicant will
" provide a proper service, an order may be made by the board
" that a licence be granted to the applicant in accordance with
" its finding upon proper security being furnished.

" 9. If at any time conditions are such that in the opinion
" of the chief highway engineer, a highway is being or would be
" damaged by the operation of any public motor bus or public
" motor truck, the chief highway engineer may order an
" immediate discontinuance of operation on such highway until
" further order.

" 11. Except as provided by this Act, no person, firm or

" company shall operate a public motor bus or public motor truck
 " on the highways within the province without holding a licence
 " from the board authorizing such operations and then only as
 " specified in such licence and subject to this Act and the
 " regulations.

" 17.—(1) The board may from time to time make regulations
 " fixing the schedules and service, rates, fares and charges of
 " licensed motor carriers, prescribing forms, . . . requiring the
 " filing of returns, reports and other data and generally make
 " regulations concerning motor carriers and public motor buses
 " and public motor trucks as the board may deem necessary or
 " expedient for carrying out the purposes of this Act and for the
 " safety and convenience of the public and may from time to time
 " repeal, alter and amend any such orders, rules and regulations.
 " All general regulations shall be subject to the approval of the
 " Governor in Council and on being approved shall be published
 " in The Royal Gazette. [am. 1940, c. 11.] "

The Act was originally passed in 1937, but certain amendments have been made in it since that date. Two alterations in section 4 may be referred to inasmuch as some reliance was placed upon them as assisting in the construction of the provisions of the Act. Originally the section ended " over specified routes *and* between " specified points within the province." The alteration from " and " to " or " in their Lordships' opinion is immaterial to any question which they have to decide. As to the omission of the words " within the province " they agree with the Supreme Court of Canada that, whatever may have been in the mind of the provincial authorities in deleting them, those words must be implied inasmuch as the province can exercise no authority over another province or over a foreign country.

The vital question for their Lordships' determination is what restrictions are or can be placed by the province of New Brunswick upon inter-state or inter-national undertakings by reason of the provisions of the Motor Carrier Act, and whether the terms of the licence actually granted to Mr. Winner are authorized under that Act.

The powers entrusted to the Dominion and province respectively are those set out in sections 91 and 92 of the British North America Act, 1867. Well known as those provisions are, their Lordships think that the matter is clarified by setting out the relevant provisions of section 92, omitting, however, subsection (16), inasmuch as that subsection in the present case adds

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J. C. nothing to the arguments which depend upon the wording of subsection (10).

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“ 92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say:—(10) Local works and undertakings other than such as are of the following classes: (a) Lines of steam, or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province: (b) Lines of steam ships between the province and any British or foreign country: (c) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces: (13) Property and civil rights in the province.”

It is now authoritatively recognized that the result of these provisions is to leave local works and undertakings within the jurisdiction of the province but to give to the Dominion the same jurisdiction over the excepted matters specified in (a), (b) and (c) as they would have enjoyed if the exceptions were in terms inserted as one of the classes of subjects assigned to it under section 91: see *City of Montreal v. Montreal Street Railway Co.*¹

The Supreme Court of the province (Richards C.J., Harrison and Hughes J.J.) answered all three questions, and at the expense of repetition but for the sake of clarity their Lordships again set out the questions inserting the answers given by that court:—

1. “ Are the operations or proposed operations of the defendant within the province of New Brunswick or any part or parts thereof as above set forth, prohibited or in any way affected by the provisions of the Motor Carrier Act, 1937, and amendments thereto, or orders made by the said Motor Carrier Board? ”

Answer: “ Yes, prohibited, until the defendant complies with the provisions of the Act.”

2. “ Is 13 Geo. 6, c. 47, 1949, intra vires of the legislature of the province of New Brunswick? ”

Answer: “ Yes, in respect of this defendant.” (Richards C.J. and Hughes J. answering simply “ Yes.”)

3. “ Are the proposed operations prohibited or in any way affected by regulation 13 of the Motor Vehicle Act, chapter 20

¹ [1912] A.C. 333, 342; 28 T.L.R. 220.

" of the Acts of 1934 and amendments, or under sections 6 or 53
 " or any other sections of the Motor Vehicle Act? "

Answer: " Yes, until the defendant complies with the pro-
 " visions of the Act, and the regulations made thereunder."

From that decision an appeal was taken by Mr. Winner to the Supreme Court of Canada by leave of the Supreme Court of New Brunswick. Meanwhile the Attorney-General of New Brunswick gave notice of his intention to intervene, and at a later time, pursuant to orders made by the Supreme Court of Canada, the Attorney-Generals for Canada and for the provinces of Ontario, Quebec, Nova Scotia, British Columbia, Alberta and Prince Edward Island, together with the Canadian National Railway Company, Canadian Pacific Railway Company, Maccam Transport Company and Carwill Transport Limited intervened.

When the matter came to be considered by the Supreme Court of Canada (Rinfret C.J., Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright, and Fauteux JJ.) that court pointed out that it was concerned not with a reference but with an action, that the claim was in its origin made by one motor carrier against another motor carrier asking that he be prohibited by injunction from taking up and setting down passengers in the province of New Brunswick, and that the questions asked involved the consideration of matters outside those involved in the decision of the dispute raised by the pleadings.

The Chief Justice, indeed, took the view that the only power of the province was to deal with the appellant under the Motor Vehicles Act since (1) by section 22 the provisions of the Motor Carrier Act were to be deemed to be in addition to the provisions of the Motor Vehicles Act; (2) the Motor Vehicles Act provided for the treatment of non-residents whereas the Motor Carrier Act did not; (3) in the case of non-residents, therefore, the Motor Carrier Board had no authority to give or withhold or limit the terms of a licence; (4) there was no evidence or contention that Mr. Winner had not complied with the provisions of the Motor Vehicles Act, and (5) there was therefore no ground on which the court could grant an injunction. The other members of the court agreed with the Chief Justice that there was no reference and that the sole question for their determination was whether as between the two parties the one could obtain as against the other an injunction prohibiting him from picking up or setting down passengers within the province. In their view, however, the provisions of the Motor Carrier Act affected the position of a foreigner, and the dispute between the parties was whether under

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those provisions or by the terms of their licence the board had power to prohibit Mr. Winner from embussing or debussing passengers within the province of New Brunswick. They did not determine that the board had no power to issue a licence to a non-resident, and accordingly based their decision upon a consideration whether the Motor Carrier Act or the terms of the licence were authorized by the powers given to a province under the British North America Act.

Their Lordships are not prepared to hold that the Motor Carrier Board lack authority to deal with residents in provinces or countries other than New Brunswick or to decide that the provisions of the Motor Carrier Act have no application to the case. Nor, indeed, was any such contention put before them. They therefore proceed to discuss the problem whether the Motor Carrier Act or the licence is ultra vires the jurisdiction of the province.

It was on this basis that the matter was dealt with by the Supreme Court of Canada, and accordingly that court did not answer the individual questions put to them, but summed up their conclusions in the following order: "And this court, proceeding to render the judgment which should have been rendered by the said Supreme Court of New Brunswick, Appellate Division, did order and adjudge that the answer to such parts of the questions submitted as it is considered necessary to answer for the disposition of the issues properly raised in the pleadings is as follows:—

"1. It is not within the legislative powers of the province of New Brunswick by the statutes or regulations in question, or within the powers of the Motor Carrier Board by the terms of the licence granted by it, to prohibit the appellant by his undertaking from bringing passengers into the province of New Brunswick from outside said province and permitting them to alight or from carrying passengers from any point in the province to a point outside the limits thereof, or from carrying passengers along the route traversed by its buses from place to place in New Brunswick, to which passengers stop-over privileges have been extended as an incident of the contract of carriage; but except as to passengers to whom stop-over privileges have been extended as aforesaid it is within the legislative powers of the province of New Brunswick by the Statutes and regulations in question, and within the powers of the Motor Carrier Board by the terms of the licence granted by it, to prohibit the appellant by his undertaking from carrying

“passengers from place to place within the said province
“incidentally to his other operations.”

It will be observed that the order in question adopts a compromise which does not appear to have been contended for by either side, viz., whilst permitting the taking up or setting down of passengers engaged in an inter-provincial or inter-national journey, it prohibited the carrying of persons between two points where the journey was wholly within the province.

From that decision there was an appeal, by special leave, to their Lordships' Board by the Attorney-General for Ontario and others against that part of the judgment which permitted any kind of picking up or setting down within the province of New Brunswick whether in the course of a journey beginning outside the province and ending within it or in the course of a journey beginning within it and ending without the province. There was also a cross-appeal by Mr. Winner and others against the prohibition of purely intra-state traffic, that is, carriage from one point within the province to another point also within it.

Before their Lordships when dealing with the matter of the appeal it was urged (1) that Mr. Winner's business did not come within the exception contained in section 92 (10) (a), and (2) that in any case the province as owner of, or as being in control of, its highways had jurisdiction over them not only to licence operations upon them but to regulate them in all respects. By virtue, it was said, of the powers of the province to control provincial highways and traffic, the Motor Carrier Board had power to grant or refuse a licence to Mr. Winner at their discretion. It was acknowledged that it had in fact granted him a licence, but asserted that the condition attached to the licence was merely a condition upon which he became entitled to operate upon the highways of the province, not a regulation of his business or undertaking.

The first proposition involves a close and careful consideration of the terms and effect of section 92 (10) (a). The argument was put in a number of ways. In the first place it was said that works and undertakings must be read conjunctively, that the subsection has no operation unless the undertaking is both a work and an undertaking—the former a physical thing and the latter its use. There was, it was maintained, in the present instance no work, and the existence of a work was an essential element in order to make the subsection applicable. The necessity for the existence of both elements might, it was said, be illustrated by considering the case of a railway, where there was both a track

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and the carriage of goods and passengers over it, and in construing the words "works and undertaking" regard must be paid to the words associated with them in the subsection.

Their Lordships do not accept the argument that the combination of a work and an undertaking is essential if the subsection is to apply. Perhaps the simplest method of controverting it is to point out that the section begins by giving jurisdiction to the provinces over local works and undertakings. If, then, the argument were to prevail, the province would have no jurisdiction except in a case where the subject-matter was both a work and an undertaking. If it were not both, but only one or the other, the province would have no authority to deal with it, and at any rate under this section local works which were not also undertakings and local undertakings which were not works would not be subject to the jurisdiction of the province—a result which, so far as their Lordships are aware, has never yet been contemplated. Moreover, in subsection (10) (c) the word "works" is found uncombined with the word "undertakings," a circumstance which leads to the inference that the words are to be read disjunctively so that if either works or undertakings connect the province with others or extend beyond its limits, the Dominion, and the Dominion alone, is empowered to deal with them.

The case of steamships is an even more potent example of the difficulty of reconciling the suggested construction with the wording of the section. Lines of steamships between the province and any British or foreign country can carry on their operations without the existence of any works. The only connecting link which they provide is by passing to and fro from the one to the other. Their Lordships must accordingly reject the suggestion that the existence of some material work is of the essence of the exception. As in ships so in buses it is enough that there is a connecting undertaking.

It is true, and was contended, that it is possible to postulate that section 92 (10) has a limited scope and deals only with matters which are both works and undertakings. Works alone and undertakings alone are in this aspect entrusted to the province under subsection (13) as being property and civil rights, or under (16) as being matters of a merely local or private nature in the province. It was argued, accordingly, that jurisdiction over inter-connecting works and undertakings is given to the Dominion under the general words inserted at the beginning and end of section 91 but not under section 92 (10). In terms, however, the language of section 92 (10) (c) embraces a wider subject-matter and, in

their Lordships' view, is not confined to so limited a construction. All local works and all local undertakings are included under the phraseology used, and it is in their Lordships' opinion immaterial that *ex abundante cautela* they are again covered by subsection (13).

If the province is given authority over both local works and local undertakings it follows that the exceptional works and undertakings in subsection (10) (a) likewise comprise both matters.

Some illumination is, as their Lordships think, given by a consideration of the decision in the *Radio* case (*In re the Regulation and Control of Radio Communication in Canada*).² The question in issue was whether the control of radio transmission was in whole or in part within the jurisdiction of the Dominion or of a province, and it was held that the sole authority resided with the Dominion. Undoubtedly the main contention in that case was that a convention had been entered into between Great Britain, Canada and other Dominions and Colonies on the one part and foreign countries on the other, and that accordingly under the general powers conferred upon it by section 91 of the British North America Act, 1867, to make laws for the peace, order and good government of Canada the Parliament of Canada had under the convention a power similar to that which it would have had under section 132 if the convention had been a treaty between the British Empire, as an entity, and foreign countries. This aspect of the decision is stressed by their Lordships' Board in the Labour Convention case (*Attorney-General for Canada v. Attorney-General for Ontario*).³ But that case was concerned with the effect of section 132 and except incidentally does not mention section 92.

The *Radio* case,⁴ on the other hand, expressly applies the provisions of section 92 (10): "Their Lordships," it is said, "draw special attention to the provisions of head (10) of section '92. These provisions, as has been explained in several judgments of the Board, have the effect of reading the excepted matters into the preferential place enjoyed by the enumerated subjects of section 91." After quoting the words of this subsection, the judgment continues⁴: "Now, does broadcasting fall within the excepted matters? Their Lordships are of opinion that it does, falling in (a) within both the word 'telegraphs' and the general words 'undertakings connecting the province

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² [1932] A.C. 304, 314-5.

⁴ [1932] A.C. 304, 314.

³ [1937] A.C. 326, 351; 53 T.L.R.

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“ ‘with any other or others of the provinces or extending beyond
 “ ‘the limits of the province.’ ” Later the judgment proceeds
 to say “ ‘undertaking is not a physical thing but is an arrangement
 “ ‘under which of course physical things are used.’ ”

In their Lordships' view, these expressions are directly applicable to the present case. In the *Radio* case⁴ there was no connecting work, only a connecting undertaking, unless the somewhat fanciful suggestion were to be adopted that the flow of an electric discharge across the frontier of a province is to be regarded as a physical connexion.

It is argued that the provinces are entrusted with local works and undertakings subject, however, to the exception that they must be “other than such as are in the following classes,” and that on its true construction the section must mean “other than “such local works and undertakings as are within those exceptions.” The submission goes on to maintain that *ex concessis* Mr. Winner's work or undertaking is not local, having no anchorage, as it were, within the province, and for that reason is not within the exception. Their Lordships' Board does not so read the subsection. In their opinion “other than such” merely means such works and such undertakings as are within the categories thereafter set out.

The argument can be tested by considering its effect upon one of the specific subjects mentioned, e.g., railways. A railway is an exception to local works and undertakings because it is included in the words “other than such,” etc. But if the appellants' argument is sound the section must mean local works and undertakings other than such local works and undertakings as are in the category of railways; and, as the exception only includes local works, it would take local railways out of the jurisdiction of the province, which it does not, and would not comprehend inter-connecting railways, which have always been held to be included, and the inclusion of which is obviously one of the objects of the subsection.

One further point was put forward upon this aspect of the case. It was suggested that, whatever view be taken of the matters with which their Lordships have dealt, yet Mr. Winner's activity never became an undertaking until he received a licence; until then it was but a project; he could not get to work before he had a licence. It was true, the argument went on, that he had obtained a licence, but his licence only permitted him to

⁴ [1932] A.C. 304, 314.

run through New Brunswick without embarking or disembarking passengers. That was his undertaking and, so far as New Brunswick was concerned, it could not be enlarged by a claim that it was an inter-provincial or inter-national undertaking.

Their Lordships are not prepared to accept the contention that an undertaking has no existence until it is carried into effect or is capable of being lawfully carried out. It may be an undertaking at any rate if the promoter has done everything which was necessary on his part to put it in motion, and has made all the essential arrangements. Indeed, the argument that the undertaking did not come into existence until a licence was granted and the transporting actually began is, in their Lordships' view, inconsistent with the opinion expressed by the Board in *Toronto Corporation v. Bell Telephone Company of Canada*,⁵ where it is said: "The view of Street J. apparently was that, inasmuch as the Act of incorporation did not expressly require a connection between the different provinces, the exclusive jurisdiction of the Parliament of Canada over the undertaking did not arise on the passing of the Act, and would not arise unless and until such a connection was actually made. In the meantime, in his opinion, the connection was a mere paper one, and nothing could be done under the Dominion Act without the authority of the legislature of the province. This view, however, did not find favour with any of the learned Judges of Appeal. In the words of Moss C.J.O., 'the question of the legislative jurisdiction must be judged of by the terms of the enactment, and not by what may or may not be thereafter done under it. The failure or neglect to put into effect all the powers given by the legislative authority affords no ground for questioning the original jurisdiction.' If authority be wanted in support of this proposition, it will be found in the case of *Colonial Building and Investment Association v. Attorney-General of Quebec*,⁶ to which the learned Judges of Appeal refer."

In any case Mr. Winner had obtained a licence and has been exercising a business of transportation under it and has not limited his undertaking to the terms of his licence.

To succeed upon this point the appellants would have to say that this is a local work and undertaking because it makes use of the provincial roads, and that the only existing undertaking is one in which the respondent cannot take up or set down passengers in the provinces. In fact, however, another undertaking does

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⁵ [1905] A.C. 52, 58; 21 T.L.R. 45.

⁶ (1883) 9 App.Cas. 157, 165.

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exist, viz., that of through carriage and also of picking up and setting down passengers within the province and that undertaking existed from the initiation of Mr. Winner's activities and still exists since, whether rightfully or wrongfully, he has from the start embussed and debussed passengers within the province. That he does so is stated in the facts, and whether the picking up and setting down of passengers is lawful or unlawful is the matter which their Lordships have to determine.

On this part of the case, therefore, the Board agrees with the majority of the judges of the Supreme Court; and though it is true that the Chief Justice does not find it necessary to consider the point, he at least has expressed no opinion against it.

The second contention put forward on behalf of the appellants was that whatever their exact legal position with regard to the roads, they admittedly make, maintain and control them; the roads are local works and undertakings constructed and maintained by the province; in that capacity it is entitled to regulate their use in any way it pleases and, indeed, to prohibit their use if it so wishes. The contention is an important one because, if it is true, interprovincial undertakings connecting one province with another are within the jurisdiction of the Dominion, but can be totally sterilized by Acts and regulations of the province curtailing or preventing the use of its roads. It was alleged that the roads are property in the province—as indeed they are—that roads of one province are divided by an imaginary line from those of another province or another nation at the point of meeting: there is therefore no connecting work and, their roads being local, the province has absolute power over their uses, i.e., both the method of use and whether they may or not be used at all.

Their Lordships are not concerned to dispute either the provincial control of the roads or that it has the right of regulation, but there nevertheless remains the question of the limit of control in any individual instance and the extent of the powers of regulation.

It would not be desirable, nor do their Lordships think that it would be possible, to lay down the precise limits within which the use of provincial highways may be regulated. Such matters as speed, the side of the road upon which to drive, the weight and lights of vehicles are obvious examples, but in the present case their Lordships are not faced with considerations of this kind, nor are they concerned with the further question which was mooted before them, viz., whether a province had it in its power to plough up its roads and so make inter-provincial connections impossible.

So isolationist a policy is indeed unthinkable. The roads exist and in fact form a connexion with other provinces and also, in this case, with another country. Since in their Lordships' opinion Mr. Winner is carrying on an undertaking connecting New Brunswick both with Nova Scotia and the State of Maine there exists an undertaking connecting province with province and extending beyond the limits of the province.

Prima facie at any rate, such an undertaking is entrusted to the control of the Dominion and taken out of that of the province. No doubt if it were not for section 90 (10) (a) of the British North America Act the province, having jurisdiction over local works and undertakings and over property and civil rights within the province, could have prohibited the use of, or exercised complete autocratic control over, its highways, but the subsection in question withdraws this absolute right where the undertaking is a connecting one. To this limitation some meaning must be given, and their Lordships cannot accept the view that the jurisdiction of the Dominion is impaired by the province's general right of control over its own roads. So to construe this subsection would, in their Lordships' opinion, destroy the efficacy of the exception.

The limitation of the jurisdiction of Dominion and province has been many times canvassed and litigated both in the Canadian courts and in the Privy Council. Undoubtedly the province has wide powers of regulation. Many instances were adduced in the course of argument and their Lordships may refer to certain of those most relied upon. In *Colonial Building & Investment Association v. Attorney-General of Quebec*⁶ the provincial mortmain laws were said to be contrary to the jurisdiction given to the Dominion in respect of Dominion companies. The principles relied on are set out in the following words⁷:

" But the powers found in the Act of incorporation are not
 " necessarily inconsistent with the provincial law of mortmain,
 " which does not absolutely prohibit corporations from acquiring
 " or holding lands, but only requires, as a condition of their so
 " doing, that they should have the consent of the Crown. If that
 " consent be obtained, a corporation does not infringe the pro-
 " vincial law of mortmain by acquiring and holding lands. What
 " the Act of incorporation has done is to create a legal and
 " artificial person with capacity to carry on certain kinds of
 " business, which are defined, within a defined area, viz.,

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⁶ 9 App.Cas. 157, 165.⁷ Ibid. 166.

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“ throughout the Dominion. Among other things, it has given to
“ the association power to deal in land and buildings, but the
“ capacity so given only enables it to acquire and hold land in
“ any province consistently with the laws of that province relating
“ to the acquisition and tenure of land.”

Similar propositions were laid down in *Great West Saddlery Co. Ltd. v. The King*,⁸ where the gist of the decision may be taken from the headnote where it says: “ A company incorporated by
“ the Dominion under the Companies Act of Canada . . . with
“ power to trade in any province may, consistently with sections
“ 91 and 92 of the British North America Act, 1867, be subject
“ to provincial laws of general application, such as laws imposing
“ taxes, or relating to mortmain or requiring licences for certain
“ purposes, or as to the form of contracts.”

For the same reasons it was held in *Lyburn v. Mayland*⁹ that a provision prohibiting the selling of the shares of Dominion companies was not ultra vires provincial legislation inasmuch as it did not preclude them from selling their shares unless they were registered but merely subjected them to competent provisions applying to all persons trading in securities.

Both the latter cases, however, are careful to point out that legislation will be invalid if a Dominion company is sterilized in all its functions and activities or its status and essential capacities are impaired in a substantial degree. What provisions have the effect of sterilizing all the functions and activities of a company or impair its status and capacities in an essential degree will, of course, depend on the circumstances of each case, but in the present instance their Lordships cannot have any doubt but that the Act or the licence or both combined do have such an effect on Mr. Winner's undertaking in its task of connecting New Brunswick with both the United States of America and with the province of Nova Scotia.

Nor indeed, whatever may be said of the Act, is the licence a provision applying to all persons. It is a particular provision aimed at preventing Mr. Winner from competing with local transport companies in New Brunswick.

But, it is contended, there are two rights—that of the Dominion and that of the province—one giving power to the one body and the other to the other, and enabling Dominion or province to pass legislation dealing with its own topic: the province with its roads and the Dominion with connecting undertakings. So long as the

⁸ [1921] 2 A.C. 91; 37 T.L.R. 436. ⁹ [1932] A.C. 318, 324; 48 T.L.R. 231.

Dominion has not, as it has not, passed legislation dealing with the matter, the powers overlap and the province is entitled to enact its own provisions which, unless and until the Dominion deals with the matter, are valid and enforceable. This argument does not appear to have been presented to the courts in Canada and their Lordships do not agree with it.

The province has indeed authority over its own roads, but that authority is a limited one and does not entitle it to interfere with connecting undertakings. It must be remembered that it is the undertaking, not the roads, which comes within the jurisdiction of the Dominion, but legislation which denies the use of provincial roads to such an undertaking or sterilizes the undertaking itself is an interference with the prerogative of the Dominion.

Whatever provisions or regulations a province may prescribe with regard to its roads it must not prevent or restrict inter-provincial traffic. As their Lordships have indicated, this does not in any way prevent what is in essence traffic regulation, but the provisions contained in local statutes and regulations must be confined to such matters.

In the present case they are not so confined. They do not contain provisions as to the use of the highways—they are not even general regulations affecting all users of them. They deal with a particular undertaking in a particular way and prohibit Mr. Winner from using the highways except as a means of passage from another country to another State. It does not indeed follow that a regulation of universal application is necessarily unobjectionable—each case must depend upon its own facts—but such a regulation is less likely to offend against the limitation imposed on the jurisdiction of the province inasmuch as it will deal with all traffic and not with that connecting province and province. The question as their Lordships see it, and indeed as it was argued, raises the hackneyed consideration what is the pith and substance of the provision under consideration. Is it in substance traffic regulation or is it an interference with an undertaking connecting province and province? Their Lordships cannot doubt but that it was the latter. It obviously sought to limit activities of an undertaking connecting the State of Maine with New Brunswick and New Brunswick with Nova Scotia. It was not mere regulation of road traffic. It is true that the distinction between the jurisdiction of the Dominion and that of a province may be a fine one, as appears from a comparison of two cases, viz., *Canadian Pacific Railway v. Corporation of the Parish*

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of *Notre Dame de Bonsecours*¹⁰ and *Madden v. Nelson and Fort Sheppard Railway*.¹¹ But except to call attention to the fact that each case must depend on an exact examination of its own facts those decisions are not directly relevant to any point which their Lordships have to decide.

In their Lordships' opinion the action of the province was an incursion into the field reserved by the British North America Act to the Dominion. In coming to this conclusion their Lordships refrain from deciding whether the Act or the regulations or both are beyond the powers of the province. It may be that the Act can be so read as to apply to provincial matters only. If this be so, the licence given to Mr. Winner is an unauthorized limitation of his rights, because it is for the Dominion alone to exercise either by Act or by regulation control over connecting undertakings. On the other hand, it may be that the Act itself must be construed as interfering with undertakings connecting province with province or with another country. In either case the province, either through the Act itself or through the licence issued in pursuance of regulations made under the Act, has exceeded its jurisdiction. The licence, indeed, may be good as a licence, but the limitation imposed in it is *ultra vires and of no effect*.

There remains, however, the further question whether, although the licence cannot be limited in the manner imposed by the board, Mr. Winner can, nevertheless, as the Supreme Court adjudged, be prohibited from taking up and setting down purely provincial passengers, i.e., those whose journey both begins and ends within the province. So far as their Lordships are able to judge, none of the parties and none of the interveners suggested such a compromise in any of the courts in Canada.

Their Lordships might, however, accede to the argument if there were evidence that Mr. Winner was engaged in two enterprises, one within the province and the other of a connecting nature. Their Lordships, however, cannot see any evidence of such a dual enterprise. The same buses carried both types of passenger along the same routes; the journeys may have been different, in that one was partly outside the province and the other wholly within, but it was the same undertaking which was engaged in both activities.

The Supreme Court, however, approached the question from a different angle. To them a distinction should be drawn between

¹⁰ [1899] A.C. 367.

¹¹ [1899] A.C. 626; 15 T.L.R. 484.

what was an essential and what an incidental portion of the enterprise. In their view the portion which could be shed without putting an end to it did not constitute an essential part of the undertaking and, therefore, could be dealt with by the province, leaving only the essential part for the Dominion's jurisdiction.

Their Lordships are of opinion that this method of approach results from a misapprehension of the true construction of section 92 (10) (a) of the British North America Act. The question is not what portions of the undertaking can be stripped from it without interfering with the activity altogether; it is rather what is the undertaking which is in fact being carried on. Is there one undertaking, and as part of that one undertaking does the respondent carry passengers between two points both within the province, or are there two?

The view of the Supreme Court is succinctly put by Rand J. when he says ¹²: "Assuming, then, that the inter-national and "inter-provincial components of Winner's service are such an undertaking as head 10 envisages, the question is whether, by "his own act, for the purposes of the statute, he can annex to it "the local services. Under the theory advanced by Mr. Tennant, "given an automobile, an individual can, by piecemeal accumulation, bring within paragraph 10 (a) a day-to-day fluctuating "totality of operations of the class of those here in question. The "result of being able to do so could undoubtedly introduce a "destructive interference with the balanced and co-ordinated "administration by the province of what is primarily a local "matter; and the public interest would suffer accordingly. There "is no necessary entirety to such an aggregate and I cannot think "it a sound construction of the section to permit the attraction, "by such mode, to Dominion jurisdiction of severable matter "that otherwise would belong to the province."

No doubt the taking up and setting down of passengers journeying wholly within the province could be severed from the rest of Mr. Winner's undertaking, but so to treat the question is not to ask is there an undertaking and does it form a connexion with other countries or other provinces, but can you emasculate the actual undertaking and yet leave it the same undertaking or so divide it that part of it can be regarded as inter-provincial and the other part as provincial.

The undertaking in question is in fact one and indivisible. It is true that it might have been carried on differently and might have been limited to activities within or without the province,

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¹² [1951] S.C.R. 887, 924.

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but it is not, and their Lordships do not agree that the fact that it might be carried on otherwise than it is makes it or any part of it any the less an interconnecting undertaking.

The contention is clearly dealt with by the observations of the Board in the *Bell Telephone* case,¹³ observations in the following words, which, in their Lordships' opinion, have a direct application to the present case: "It was argued that the company was "formed to carry on, and was carrying on, two separate and "distinct businesses—a local business and a long-distance "business. And it was contended that the local business and "the undertaking of the company so far as it dealt with local "business fell within the jurisdiction of the provincial legislature. "But there, again, the facts do not support the contention of the "appellants. The undertaking authorized by the Act of 1880 "was one single undertaking, though for certain purposes its "business may be regarded as falling under different branches or "heads. The undertaking of the Bell Telephone Company was "no more a collection of separate and distinct businesses than the "undertaking of a telegraph company which has a long-distance "line combined with local business, or the undertaking of a rail- "way company which may have a large suburban traffic and "miles of railway communicating with distant places. The "special case contains a description of the company's business "which seems to be a complete answer to the ingenious sugges- "tion put forward on behalf of the appellants."

In coming to this conclusion their Lordships must not be supposed to lend any countenance to the suggestion that a carrier who is substantially an internal carrier can put himself outside provincial jurisdiction by starting his activities a few miles over the border. Such a subterfuge would not avail him. The question is whether in truth and in fact there is an internal activity prolonged over the border in order to enable the owner to evade provincial jurisdiction or whether in pith and substance it is inter-provincial. Just as the question whether there is an inter-connecting undertaking is one depending on all the circumstances of the case, so the question whether it is a camouflaged local undertaking masquerading as an interconnecting one must also depend on the facts of each case and on a determination of what is the pith and substance of an Act or regulation.

Of course, as has so often been pointed out, whether upon the evidence adduced an activity can be adjudged to be local is a

¹³ [1905] A.C. 52, 59; 21 T.L.R. 45.

matter of law, but once it is decided that it can be local the question whether it is so is one of fact for the relevant tribunal to determine. In the case under consideration no such question arises, the undertaking is one connecting the province with another and extending beyond the limits of the province and therefore comes within the provisions of section 92 (10) (a) and is solely within the jurisdiction of the Dominion.

One note of warning should, however, be sounded. Their Lordships express no opinion whether Mr. Winner could initiate a purely provincial bus service even though it was under the aegis of and managed by his present organization. No such question, however, arises or has been raised.

As it is, their Lordships will humbly advise Her Majesty (1) that the appeal of the Attorneys-General for Ontario, Alberta and Prince Edward Island ought to be dismissed; (2) that the appeal of Israel Winner, Canadian National Railway Company and Canadian Pacific Railway Company ought to be allowed; (3) that the order of the Supreme Court ought to be varied by substituting the following answer to such parts of the questions submitted as it considered it was necessary to answer for the disposal of the issues properly raised in the pleadings: "1. It is "not within the legislative powers of the province of New Brunswick by the statutes or regulations in question, or within the "powers of the Motor Carrier Board by the terms of the licence "granted by it, to prohibit the appellant by his undertaking, as "described in paragraph 9, sub-paragraphs (a), (g), (h) and (j) "of the facts set out in the order of Hughes J. dated January "17, 1950, from bringing passengers into the province of New Brunswick from outside the said province and permitting them "to alight, or from carrying passengers from any point in the "province to a point outside the limits thereof, or from carrying "passengers along the route traversed by its buses from place to "place in New Brunswick"; (4) that the order of the Supreme Court as to costs ought to stand save that it should be varied by giving Israel Winner the whole instead of two-thirds of his costs of the appeal to the Supreme Court. The costs incurred by Israel Winner in the consolidated appeals to this Board are to be paid by the Attorneys-General for Ontario, Alberta and Prince Edward Island.

Solicitors: *Lawrence Jones & Co.; Blake & Redden; Gard, Lyell & Co.; Charles Russell & Co.; Norton, Rose, Greenwell & Co.; Burchells.*

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[HOUSE OF LORDS.]

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16, 17.

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Jan. 25, 26,

27, 28;

Apr. 1.

N.V.

APPELLANT;

AND

ADMINISTRATOR OF HUNGARIAN

PROPERTY

RESPONDENT.

Crown—Prerogative—Revenue—Immunity—Crown servant—Custodian of Enemy Property—Income of investments of property by Custodian—Income tax exemption—Trading with the Enemy Act, 1939 (2 & 3 Geo. 6, c. 89), s. 7.

Revenue—Income tax. Trading with the Enemy.

After the enemy invasion of Holland in 1940, gold in London belonging to a Dutch banking corporation was transferred to the Custodian of Enemy Property, who sold it, investing and reinvesting the proceeds of sale and the profits. These investments were subsequently transferred to the Administrator of Hungarian Property in the erroneous belief that they were the property of a Hungarian national. After the war the bank obtained judgment for the recovery of the proceeds of sale, together with the interest or other profits earned. The question then arose whether the bank was also entitled to recover a sum equivalent to an amount assessed on the custodian as income tax in respect of the income of the invested proceeds of sale and paid by him:—

Held (per Lord Reid, Lord Tucker and Lord Asquith of Bishopstone, Lord Morton of Henryton and Lord Keith of Avonholm dissenting), that if the custodian had asserted Crown immunity he would not have been obliged to pay the tax in question and, this being so, it was conceded on behalf of the administrator that the sum paid by way of tax should be treated as having passed to him, so that the claim of the bank succeeded. The custodian was a servant or agent of the Crown, and the Crown, though it had not a beneficial interest in the income in question, had under the Trading with the Enemy legislation sufficient interest therein to enable it to invoke its immunity from tax if it chose to do so.

Per Lord Morton of Henryton. Even on the footing that the custodian was a Crown servant, it could not be shown that at the material time the income was Crown income so as to be exempt from tax, since the property vested in him was that of private persons whose beneficial interest therein was "suspended" by the Trading with the Enemy legislation.

Per Lord Keith of Avonholm. Since it could not be shown that the income was Crown income or was received for the purposes of the government of this country, the custodian was liable to tax in respect of it.

* *Present*: LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER, LORD ASQUITH OF BISHOPSTONE and LORD KEITH OF AVONHOLM.

Administrator of Austrian Property v. Russian Bank for Foreign Trade (1931) 48 T.L.R. 37 applied. H. L. (E.)

In re Munster [1920] 1 Ch. 268; 36 T.L.R. 173 considered.

Decision of the Court of Appeal (sub nom. *Bank voor Handel en Scheepvaart N.V. v. Slatford*) [1953] 1 Q.B. 248, 279; [1952] 2 T.L.R. 861; [1952] 2 All E.R. 956 reversed.

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APPEAL from the Court of Appeal (Evershed M.R., Denning and Romer L.JJ.).

This was an appeal from an order of the Court of Appeal dated November 3, 1952, allowing an appeal by the respondent, the Administrator of Hungarian Property, from an order of Devlin J., dated January 18, 1952 (made on further consideration of this action following a decision delivered by him on July 30, 1951), whereby judgment was entered in favour of the appellant, Bank voor Handel en Scheepvaart N.V., a limited company incorporated in Holland, against the respondent for the sum of £2,224,367 6s. 11d., and directing that the said order be varied and that in lieu thereof judgment be entered in favour of the appellant bank against the respondent for the sum of £2,148,041 8s. 0d., and further directing that the costs of the further consideration of the said action and of the said appeal be paid by the appellant bank. (The shares in the bank were owned by a Hungarian national.)

The facts, stated by Lord Morton of Henryton, were as follows: The Custodian of Enemy Property for England and Wales was assessed to income tax in respect of income derived from certain investments made by him during a period of nearly 10 years ending in the year 1950. He paid tax amounting to a total of £72,549 9s. 11d. The custodian was a defendant in the action but was not a party to this appeal.

The events leading up to the appeal to the House of Lords were as follows: The appellants were at all material times bankers, incorporated in the Netherlands and with their head offices at Rotterdam, Holland. Immediately prior to May 20, 1940, they were the owners of 585 bars of gold and certain U.S.A. Gold Eagles deposited on their behalf with the City Safe Deposit and Agency Co. Ltd., Throgmorton Avenue, in the City of London, and they were also the creditors of certain banks in London in sums amounting to £18,790 3s. 8d., being balances standing to the appellants' credit with such banks. In May, 1940, Germany invaded the Netherlands. On May 20, 1940, the Netherlands became "enemy territory" and the appellants accordingly became "enemies," and the said gold and balances

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became "enemy property," in each case within the meaning of the Trading with the Enemy Act, 1939. By a vesting order dated July 3, 1940, as varied by a further order dated July 22, 1940, made under the Trading with the Enemy Act, 1939, and the Trading with the Enemy (Custodian) Order, 1939, the Board of Trade vested the legal title to the said gold in the Custodian of Enemy Property and empowered him to sell the same. On July 24, 1940, the custodian sold the gold for £1,984,120 15s. 5d., and from time to time thereafter invested and reinvested the proceeds of sale and profits of such investment and reinvestment (together with other funds in his hands as custodian as one mixed fund) in the purchase at discount of Treasury bills, such investments producing during the period July 24, 1940, to April 12, 1950, profits, or "fruits" as they have been called, amounting to £151,454 17s. 2d. By letter dated April 6, 1950, the respondent, the Administrator of Hungarian Property, demanded the proceeds of the sale of gold, and also the bank balances, from the custodian, on the ground that they were subject to a charge under the Treaty of Peace (Hungary) Order, 1948, made under the Treaties of Peace (Italy, Rumania, Bulgaria, Hungary and Finland) Act, 1947. On or about April 12, 1950, the custodian, in compliance with this demand, and a certificate accompanying it, transferred to the respondent the sum of £1,962,852 14s. 9d., being the proceeds of the sale of the gold, plus the bank balances, less the custodian fee. No part of the sum of £151,454 17s. 2d. representing the "fruits" was transferred by the custodian to the respondent. The demand and certificate were based on the assumption that the property in question belonged to or was held or managed on behalf of a Hungarian national, but in the course of the present action Devlin J. held that this assumption was incorrect.

The appellants issued their writ in the present action on January 12, 1950, against the custodian and the present respondent. Against the custodian they claimed, *inter alia*, delivery up of the gold or its value. This claim was dismissed by Devlin J., and there was no appeal against his decision. Against the respondent the appellants claimed a declaration that the proceeds of sale of the gold and the bank balances were not subject to any charge imposed by the Treaty of Peace (Hungary) Order, 1948, and that the appellants were absolutely entitled thereto. They also claimed payment of these moneys with interest.

During the course of the trial of the action before Devlin J.

the appellants contended that if they succeeded in their claim against the respondents they were entitled not only to the capital sum representing the actual proceeds of sale of the gold but also the "fruits" of the investment thereof, namely, any interest or other money which the capital sum earned whilst in the hands of the custodian, even though such "fruits" had not actually been transferred by the custodian to the respondent. At this point it was agreed on behalf of the respondent that those fruits, whatever they were (their precise amount not having been ascertained at that time) should be treated as being part of the actual proceeds of sale in the hands of the respondent. Devlin J., in giving judgment for payment of the capital sums in question in favour of the appellants, said¹: "The interest payable on the proceeds of the gold bars has not been separately ear-marked, but the custodian says that while it was in his hands it would have earned on the average from 1940 to 1950 about three-quarters per cent. per annum. The Solicitor-General is willing to treat these fruits as part of the proceeds in the hands of the administrator, and, accordingly, the judgment which I give will be for the amount which the administrator actually received increased by that addition." Devlin J. directed that the precise figure for which payment was to be entered should, if possible, be agreed between the parties, with liberty to apply in the event of such agreement not being reached.

Thereafter correspondence took place between the solicitors for the respective parties, but no agreement was reached, the dispute being whether the proper figure to be taken for the profits or "fruits" was, as the appellants contended, £151,454 17s. 2d., being the agreed gross amount of the profits earned by the said gold proceeds from the discounting of Treasury bills by the custodian during the period in question, namely, from July 12, 1940, to April 12, 1950; or was, as the respondent contended, the gross amount of such interest less the sum which the custodian had paid or purported to pay as income tax in respect of the profits in question. The matter was accordingly restored to Devlin J. for further consideration.

At the hearing a discussion took place as to whether or not the "concession" or "agreement" made by the respondent at the trial of the action, that the "fruits" should be treated as part of the proceeds of sale in the hands of the respondent, was binding. Counsel on behalf of the respondent eventually conceded

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¹ [1951] 2 All E.R. 779, 800.

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that if the court were to hold that the custodian was not liable to pay tax, then the sum which had been paid by way of tax should be treated as having passed to the respondent and should be included in the amount of the judgment. This concession was made subject to certain reservations which are not material for the purpose of this appeal. The only question, therefore, which remained to be decided by Devlin J., and the only question which came before the Court of Appeal, was whether or not the custodian was liable to pay income tax on the sum in question. Devlin J. held that he was not so liable. The Court of Appeal held that he was. The same question, and no other, was now before the House of Lords for decision.

Charles Russell Q.C. and *Mark Littman* for the appellant bank. From the point of view of status the Custodian of Enemy Property is either a servant or agent of the Crown in the strict sense or is to be considered in consimili casu and must be treated as such in all circumstances because: (1) he is both appointed by and dismissible by the Board of Trade (Trading with the Enemy Act, 1939, ss. 7 (1) and 15 (5), and Defence (Trading with the Enemy) Regulations, 1940, reg. 4 (2)); (2) the expenses of his office are defrayed out of moneys provided by Parliament, any fees received by him being payable into the Exchequer (Trading with the Enemy Act, 1939, ss. 7 (7) and 11); (3) he has no scope for the exercise of independent discretion and acts under the general and special direction of the Board of Trade (e.g., Trading with the Enemy (Custodian) Order, 1939), and he is not a corporation sole.

This property was vested in the custodian to await arrangements by His Majesty. He was acting in an official capacity as an instrument of the Crown in the government of the country. He is as much a servant of the Crown as a first-grade civil servant in the Board of Trade fulfilling functions as such. These moneys are all public moneys in which no one has a beneficial interest. They can only be dealt with under statutory sanction. In relation to the relevant legislation and the Orders made under it, the custodian was acting in pursuit of Crown purposes within the sphere of general executive government and, accordingly, he was not liable to pay income tax any more than local authorities are liable to pay tax under Schedule A on local government premises.

On any construction of section 7 of the Act of 1939, the custodian was dealing with these moneys as agent for the Crown

and as an instrument of the Crown in pursuance of the Crown purposes of general executive government, particularly in the field which historically has always been allied to the prerogative. He is in a position different, say, from that of the Trinity House lighthouse authority, which does not touch the aspects of administration always falling within the Crown's executive function. In the case of the Post Office, it has always been historically a prerogative of the Crown to run the mails, but the case of Cables & Wireless Ltd. was different and the Crown took over the shares of the company so that the commercial entity continues. Whichever way the present case is looked at, there are no aspects of it which would give ground for holding that the custodian is in a similar position. The Court of Appeal was wrong in holding that no question of Crown immunity arose unless the income immediately, as it accrued, became part of the public revenue.

It is true that if one is considering a new office one must look at its functions to see whether the holder has Crown status. In the case of some offices (e.g., that of the Home Secretary) one does not inquire further, but that cannot be the beginning and the end of the matter. Here, in every relevant sense, the custodian is a servant of the Crown, and therefore shares the Crown's immunity from income tax which arises from the fact that the Crown is not named in the Income Tax Acts and that they are not directed against it.

Nothing qualifies the powers of confiscation given to the government by the Act of 1939. The very application, present or future, of these moneys is a Crown activity, and so is their receipt and retention. It is an over-simplification to say that only money immediately payable into the Exchequer is immune from income tax. In the present case, the purpose served by the custodian is throughout a Crown purpose, whatever eventually happens to the money, since what eventually happens is also a Crown purpose. One must look to see what are the functions of a servant of the Crown, and in this case the custodian is a servant of the Crown for the purposes of the government.

In the case of property in the hands of the custodian, there is no automatic way in which the *spes successionis* of the person from whom it was taken can come to fruition. It cannot do so by reason of lapse of time or because former enemy territory ceases to be enemy territory. Until this property had been ordered to vest in the bank, the bank had no title at all to it.

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H. L. (E.) It was a purpose of government that the payment should be made, for until then no one had a beneficial interest in it. For that reason questions of beneficial interest are irrelevant in this case.

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During war it would not be a good thing if the enemy knew that after the war property in the hands of the custodian would be restored, for it is desirable to prevent the enemy using such property to get credit, the sinews of war. English law would not have allowed an individual Dutchman, being then an enemy alien, to bring an action against the custodian when property formerly his was legally vested in the custodian. If the custodian were making away with property in which there was a spes successionis it would be for the government to restrain him. The fact that the property may eventually pass into private hands is irrelevant. Much of the public revenue does do so (e.g., in salaries). The test is the exercise of a government function. *Administrator of Austrian Property v. Russian Bank for Foreign Trade*² is indistinguishable from the present case and the distinction suggested by Evershed M.R.³ is unsound.

At the present time there is not one Crown pocket only for public moneys, for there are several different aspects of the Crown (e.g., the Duchy of Lancaster). This property is public money, for whatever happens to it happens as a result of a government decision, and the custodian is the instrument of the government. Tax is imposed in respect of income and is not concerned with its ultimate destination.

Of the cases relating to Crown status, *Mersey Docks and Harbour Board Trustees v. Cameron*⁴ is especially relied on. See also *Coomber v. Berkshire Justices*,⁵ *Gilbert v. Trinity House Corporation*⁶ shows where the line can be drawn. *Tunncliffe v. Birkdale Overseers*⁷ illustrates the points taken to show that Crown immunity was not applicable. None of these operate against the custodian. See also *Bray v. Lancashire Justices*.⁸ *Tamlin v. Hannaford*⁹ is a modern example of an attempt to claim Crown immunity for what was a commercial corporation carrying on business under some control by the Minister, but its

² (1931) 48 T.L.R. 37.

³ [1953] 1 Q.B. 248, 290; [1952] 2 T.L.R. 861; [1952] 2 All E.R. 956.

⁴ (1865) 11 H.L.C. 443, 459, 463-5, 473, 476-7, 478, 484.

⁵ (1883) 9 App.Cas. 61, 67.

⁶ (1886) 17 Q.B.D. 795, 799.

⁷ (1888) 20 Q.B.D. 450; 4 T.L.R. 319.

⁸ (1889) 22 Q.B.D. 484; 5 T.L.R. 244.

⁹ [1950] 1 Q.B. 18; 65 T.L.R. 422; [1949] 2 All E.R. 327.

position was nothing like that of the custodian. See also *Territorial and Auxiliary Forces Association of the County of London v. Nichols*.¹⁰ *International Railway v. Niagara Parks Commission*¹¹ was a special case. *Metropolitan Meat Industry Board v. Sheedy*¹² and *Fox v. Government of Newfoundland*¹³ support the appellant bank's contentions. *Administrator of Austrian Property v. Russian Bank for Foreign Trade*¹⁴ was rightly decided and the House could not dismiss this appeal without overruling it. (See Treaty of Peace (Austria and Bulgaria) Act, 1920, and Treaty of Peace (Austria) Order, 1920.) In the present case Devlin J.¹⁵ and Denning L.J.¹⁶ considered that authority. See also *Administrator of Hungarian Property v. Finegold*,¹⁷ where the same view was taken as in that authority. The custodian comes within the law laid down in these cases on the question of Crown status.

The next question is whether or not there was a beneficial interest in the bank, but that point is irrelevant. Even if there be some scintilla of beneficial interest in the enemy whose property is in the hands of the custodian, it cannot be said that the custodian is holding it for the enemy. He holds it for the government purpose of its subsequent distribution. It is irrelevant to consider whose palm will eventually be successfully outstretched, because what will be eventually put into it will only be so put in pursuance of the Crown purpose. One need not consider whether it is likely that the successful palm will be A's or B's.

In *In re Munster*¹⁸ the view taken was that the trading with the enemy legislation permitted confiscation, and that it was for the King in Council to decide the destination of the confiscated property. By contrast, at common law, ordinarily speaking, the outbreak of war does not inevitably involve the confiscation of enemy property.

On behalf of the appellant bank this case is being argued as if it were a contest between the custodian and the Inland Revenue, and with no assumption as to ownership. See *per* Devlin J.¹⁹ in the Queen's Bench Division. The sole question therefore is

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¹⁰ [1949] 1 K.B. 35; 64 T.L.R. 438; [1948] 2 All E.R. 432.

¹¹ [1941] A.C. 328; 57 T.L.R. 462; [1941] 2 All E.R. 456.

¹² [1927] A.C. 899, 900; 43 T.L.R. 751.

¹³ [1898] A.C. 667, 671.

¹⁴ 48 T.L.R. 57.

¹⁵ [1952] 1 T.L.R. 341, 345, 348; [1952] 1 All E.R. 314.

¹⁶ [1953] 1 Q.B. 248, 293.

¹⁷ (1931) 100 L.J.K.B. 383; 47 T.L.R. 288.

¹⁸ [1920] 1 Ch. 268; 36 T.L.R. 175.

¹⁹ [1951] 2 All E.R. 779, 800.

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The authorities on the position with regard to property removed from the control and beneficial ownership of the enemy are *In re Gourju's Will Trusts*²⁰; *In re Ring Springs Ltd.'s Letters Patent*²¹; *In re Pozot's Settlement Trust*²²; *In re Ferdinand, Ex-Tsar of Bulgaria*²³; *Vamvakas v. Custodian of Enemy Property*.²⁴ See also *R. J. Reuter Co. Ltd. v. Mulhens*²⁵ and *In re Forster's Settlement*.²⁶

Under the Defence (Trading with the Enemy) Regulations, 1940, the Treasury had power to order the custodian to pay this money in any direction it chose to direct. See also the power of the Board of Trade under paragraph 3 (1) of the Trading with the Enemy (Custodian) Order, 1939.

Here a pool created by statute is given to the Crown to dispose of in a particular way. If the question of prejudice to the Crown arises, then there would be prejudice, on the respondent's contention, in that the Crown purposes would be interfered with by the compulsory diversion of the property in another direction through the operation of a taxing statute. But the Crown is not bound by statutes save by express mention or necessary implication. The Income Tax Acts do not bind it.

To summarize the appellant's contentions, the point for decision is whether the custodian was assessable to income tax on this income. It is conceded that the "fruits" of the investment were "annual profits or gains" within Schedule D arising to the custodian, a person residing in the United Kingdom, from property situate in the United Kingdom within paragraph 1 of Schedule D. It is also admitted that the "fruits" are to be treated as "created income" for income tax purposes and so are exempt from the provisions of the Finance Act, 1944, as to the custodian's liability for tax. But the custodian was not assessable to income tax because he was a servant or agent of the Crown in the strict constitutional sense, though not in the sense of ordinary contractual relationships. If that be so, he is equivalent to the Crown in his official activities of every kind when acting as the Crown's servant

²⁰ [1943] Ch. 24, 29; 59 T.L.R. 47; [1942] 2 All E.R. 605.

²¹ [1944] Ch. 180, 185; 60 T.L.R. 234; [1944] 2 All E.R. 421.

²² [1952] Ch. 427, 440; [1952] 1 T.L.R. 1042; [1952] 1 All E.R. 1107.

²³ [1921] 1 Ch. 107, 141; 36 T.L.R. 898.

²⁴ [1952] 1 T.L.R. 638; [1952] 1 All E.R. 629.

²⁵ [1954] Ch. 50; [1953] 2 All E.R. 1160.

²⁶ [1942] Ch. 199, 206; 58 T.L.R. 99; [1942] 1 All E.R. 180.

or agent. He was at all times and in all matters under the control of the Board of Trade and the Treasury.

The Crown created the custodian on its own terms and by its own orders. The terms could be varied from time to time, imposing on him such directions as were thought fit. It cannot be said that he is not the Crown's servant or agent in the strict sense on the ground that he does not hold the moneys coming into his hands with the duty immediately to pay them into the common fiscus. Even so, he is still the Crown's servant or agent for the purposes of all his functions and therefore he is the Crown. *R. J. Reuter Co. Ltd. v. Mulhens*²⁷ is right in supporting this point. In relation to the legislation of the war of 1914 Warrington L.J. in *In re Ferdinand, Ex-Tsar of Bulgaria*,²⁸ referred to the custodian as an officer of the Crown. That was correct and would be equally correct in the present case, for the directions given to the custodian are given directly by the Crown. For the purpose of deciding whether the custodian is a servant of the Crown, he is in the same position as the administrator in *Administrator of Austrian Property v. Russian Bank for Foreign Trade*,²⁹ or the Administrator of Hungarian Property in the present case. The custodian is appointed by the Crown to act for the Crown and under the Crown as a collecting, holding and distributing instrument. The situation is the same as if the Act had said that the President of the Board of Trade was to act in all matters of retention and distribution of enemy property as the King in Council might by order from time to time direct. The bank's case rests in the first place on these submissions.

If it can be said that the custodian is not a servant or agent of the Crown in the narrower sense, or that the fact that he is so is not conclusive of the matter, then this case plainly falls within the principle of *Coomber v. Berkshire Justices*,³⁰ because, if one looks at the functions of the custodian, he is an instrument of the executive government fulfilling government purposes, an instrument of the Crown on Crown business. It has been suggested that this kind of immunity may be extended to any branch of the general executive government of the country: see *per* Devlin J.,³¹ in the present case. The custodian is plainly within the limits of the principle, being an instrument of the Crown in one aspect of making war and peace. It is wrong to say that the principle is now confined to what remains of the prerogative or that to secure

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²⁷ [1954] Ch. 50.²⁸ [1921] 1 Ch. 107, 139.²⁹ 48 T.L.R. 37.³⁰ 9 App.Cas. 61.³¹ [1952] 1 T.L.R. 341, 348.

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All the functions and activities of the office of the custodian are for Crown purposes or purposes of public central government within the relevant authorities on immunity, in that (a) those functions and activities are part of the machinery of government directed to the making and prosecution of war and the making, at the conclusion of war, of treaties and agreements with other States and the implementing of those treaties and agreements, and (b) those functions and activities form a part of a machinery of government which is a modernization of (albeit an extension of and supplemental to) the ancient prerogative of withholding from the enemy, or depriving the enemy of, or preventing the enemy from obtaining, the sinews of war.

It is manifestly true that the custodian is an instrument provided by the law of England for the execution of Crown purposes, and those purposes include the reception and holding of enemy property, lest comfort be afforded to the enemy by the continued existence of credit facilities, and also the distribution of the funds at the discretion of the Crown during or after the war: see *In re Munster*.³²

The possibility that the Crown may direct the funds to be paid to private individuals is wholly irrelevant, since they can only receive something in fulfilment of a Crown purpose. That applies equally to a former enemy. The existence of a spes restitutionis or future beneficial interest is only one aspect of the possibility that private persons may ultimately get the property.

It is correct to say that the income in the present case was created and received exclusively for Crown purposes. That is true although it was not being paid out but accumulated. It is a fallacious proposition that there can be exemption from income tax only for funds bound to go straight into the fiscus. The true alternatives are either that this income is received and applicable for Crown purposes, or that it is received for private purposes which are not purposes of government, or for public purposes which fall short of being purposes of government. The former is the true view and so the assessments were not enforceable in law and were not valid.

Sir Lionel Heald A.-G., J. H. Stamp, J. P. Ashworth and R. J. Parker for the respondent. Once it is shown that the custodian came within the income tax provisions, the onus falls on the

³² [1920] 1 Ch. 268.

appellant bank to prove his immunity. The House of Lords should start with the assumption that he paid tax either because he was liable or because he thought that he was liable. This case is artificial and presents difficulties in the realm of pure law. The appellant bank must admit that the custodian was *prima facie* liable to tax under Schedule D in respect of the relevant income, although no direction was given to him to pay it. There is no possible escape by an argument on the construction of the Income Tax Acts. Reliance must be placed on some principle overriding them, i.e., the prerogative, which is law in the case of the Crown but not of the subject. Thereby the appellant bank must show that the custodian comes within Crown immunity.

While it is necessary to mould the common law in order to adapt it, there is no reason to alter its principles. One would have to find clear authority for the proposition here relied on. This is an important case because of the modern extension of governmental activities. One must consider what is the nature of Crown immunity at common law, what is its basis and how far it extends.

In general, in the field of taxation it is the receipt of the income and not the personality of the recipient which is material. Income tax is a tax on income: *London County Council v. Attorney-General*.³³ The mere statement that income is received by the Sovereign is in itself irrelevant.

In general, statutes do not apply to the Crown if they adversely affect its interests: see Holdsworth's *History of English Law*, vol. 10, pp. 354-5; Chitty's *Prerogatives of the Crown*, pp. 374-5, 383-4. Immunity arose in so far as it was necessary to protect the Crown. Thus, if the income now in question was Crown income, it was immune from tax and that is the end of the case.

The idea is supported by general constitutional principles. The Sovereign is entitled as a matter of law to refuse to assent to a Bill if anything in it is disadvantageous to his prerogative. So the Sovereign will not be taken to be bound by anything to his disadvantage in an Act of Parliament to which he might reasonably have objected, without clear words indicating that he is bound; general words are not enough. It remains open to the Crown to assert its immunity if it is sought to rely on general words to derogate from any prerogative right.

It was only the direct and immediate servants of the Crown who in *Mersey Docks and Harbour Board Trustees v. Cameron* ³⁴

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³³ [1901] A.C. 26, 35; 17 T.L.R. 131.

³⁴ 11 H.L.C. 443, 501-2.

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were said to enjoy immunity. The privilege is that of the Crown and not of its servants. Problems as to who are servants of the Crown arose under the Ministry of Health Act, 1919, and the Town and Country Planning Act, 1947: see section 3 relating to the Central Land Board. One may consider in contrast the position of the Public Trustee, appointed by the Lord Chancellor. The Custodian of Enemy Property is not appointed by the Crown but by the Board of Trade. The Transport Commission is not really in a different position in law from the custodian. It is not a servant or agent of the Crown in the ordinary sense, but is engaged in a trading operation such as in many instances the Crown formerly engaged in.

Crown immunity can be granted or recognized in the case of servants of the Crown, agents of the Crown, and people who are neither. No useful purpose is served in trying to constitute a category of such persons, and it only leads to difficulties. It is impossible to justify the submission that the custodian is entitled to immunity on the basis of his appointment or personality. He could only obtain it in respect of his activities, so that one must consider the circumstances in which he actually received the income in question.

The principle of immunity only begins to apply when the persons concerned are Crown servants. In legal theory the amount of interference with the Crown's rights needed to give rise to it would have to be something more overriding than liability to a relatively small amount of rates and taxes. The basis of the theory is the possible interference with the Crown as the fountain of justice: see *Mersey Docks and Harbour Board Trustees v. Cameron*,³⁵ where Lord Cranworth dealt with the conception of "the public government of the country." The immunity is related to the peculiar prerogatives of the Crown. See also the observations of Blackburn J.³⁶; *Reg. v. West Derby Overseers*³⁷; *Tunncliffe v. Birkdale Overseers*³⁸; *Metropolitan Meat Industry Board v. Sheedy*,³⁹ and *Territorial and Auxiliary Forces Association of the County of London v. Nichols*.⁴⁰

This case is concerned not with Acts of Parliament in general but with particular Acts of Parliament, the Income Tax Acts. It is accepted that the relevant criterion must be the exemption or non-exemption of the particular income. In the case of Schedule D

³⁵ 11 H.L.C. 443, 508.

³⁶ Ibid. 464-5.

³⁷ (1875) L.R. 10 Q.B. 283, 285, 287.

³⁸ (1888) 20 Q.B.D. 450, 452.

³⁹ [1927] A.C. 899, 902-3.

⁴⁰ [1949] 1 K.B. 35, 47.

tax is deducted at source, and so it is for the person who claims exemption to make good his case. In this case the custodian would not be entitled to say that he had received the money for the Crown as beneficiary and that, therefore, it was exempt from tax, for the rights of the original owners of the property are merely suspended. For an example of the conception of rights in suspense, see *Moodie v. Hosegood*.⁴¹ See also the Treaty of Peace (Hungary) Order, 1948, para. 1. The Order shows that it cannot be said that the former ownership in the property there dealt with had been totally extinguished, and that the property can never have become unqualified Crown property. It was being held by the custodian with a view to maintaining it so that it could be dealt with at the peace treaty.

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Wide powers were required under the Trading with the Enemy Act, 1939, and the associated Orders for the purpose of preserving the property, and they must be looked at from that point of view. For example, there might arise the necessity to hand over to a Dutchman who had escaped from Holland the property which had been his, and the income which had accrued meanwhile should be treated as his income. It would be an abuse of the powers given by the Act to use it for wholesale confiscation. The powers given to the custodian are those of a custodian, and all his duties are in that capacity. There is no ground for assuming that in the ordinary course he could ever be given directions to hand over the property to the Exchequer. It is inconceivable that the Crown would have retained this property, and so, whatever its theoretical rights, it had no sufficient interest in it to sustain a claim for immunity.

At all material times the custodian was performing the duties of his office primarily for preserving the assets of enemies and quasi-enemies until it was decided what should be done with them. A decision in the course of constitutional practice would be made by Parliament eventually and was so made at the end of the war. The property which he was holding could not, accordingly, be described as Crown property, for the whole point of creating a custodian was to have a definite responsible authority independent of the Crown. It is significant that the President of the Board of Trade was not appointed to fulfil these functions. The custodian was given a separate capacity and organization from the Board of Trade. He was a separate entity.

For the purposes of his functions it was neither necessary nor

⁴¹ [1952] A.C. 61, 74; [1951] 2 T.L.R. 455; [1951] 2 All E.R. 582.

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 1954 *In re Munster*⁴² and *In re Ferdinand, Ex-Tsar of Bulgaria*.⁴³

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*Administrator of Austrian Property v. Russian Bank for Foreign Trade*⁴⁴ is a decision which does not help in the present case and has no bearing on it. The position of the custodian is similar to that of the Accountant-General, appointed by the Lord Chancellor, who must pay income tax on the funds in his hands: see Supreme Court Funds Rules, 1929, r. 16.

Outside the immediate area of the Crown's action, the Crown's immunity from income tax is a matter to be determined ad hoc, and is only applicable in particular circumstances when there is apprehended prejudice to the Crown which would be prevented by immunity. Here there is no such reason for immunity.

By the Compensation (Defence) Act, 1939, s. 1, it is clearly contemplated that a subject's property shall not be taken away without compensation. The trading with the enemy legislation should not be construed as giving power to confiscate the property of friendly persons who were technically enemies. There is a presumption that international law will be observed, and it is inconceivable, in view of the general approach throughout this legislation, that confiscation would be a possibility: see *Trading with the Enemy (Custodian) Order, 1939*, art. 1 (i) and (ii).

There is no warrant for extending Crown immunity beyond what is necessary to justify the inclusion of quasi-Crown property, on the principle accepted in *Mersey Docks and Harbour Board Trustees v. Cameron*⁴⁵ and *Coomber v. Berkshire Justices*,⁴⁶ and strictly analogous cases relating to Crown income: see also *Greig v. Edinburgh University*.⁴⁷ Two conditions must be established for immunity: (1) The income must be applicable exclusively for Crown purposes; (2) those purposes are limited to the category specified by Blackburn J. in *Mersey Docks and Harbour Board Trustees v. Cameron*.⁴⁸ As the Court of Appeal held, these requisites were not complied with here. At the relevant time the custodian was not capable of confiscating anybody's property, even assuming that later he might have been ordered to do so. The Court of Appeal judgments show a clear path through the jungle of this part of the law.

See also *Greig v. Edinburgh University*⁴⁹; *Daimler Co. Ltd.*

⁴² [1920] 1 Ch. 268, 274, 277-8.

⁴³ [1921] 1 Ch. 107, 131-2.

⁴⁴ 48 T.L.R. 37, 38.

⁴⁵ 11 H.L.C. 443.

⁴⁶ 9 App.Cas. 61.

⁴⁷ (1868) L.R. 1 Sc. & D. 348.

⁴⁸ 11 H.L.C. 443, 465.

⁴⁹ L.R. 1 Sc. & D. 348, 350.

v. *Continental Tyre and Rubber Co. (Great Britain) Ltd.*⁵⁰; *Hugh Stevenson & Sons Ltd. v. Aktiengesellschaft für Cartonnagen-Industrie*,⁵¹ and Defence (Finance) Regulations, 1939.

J. H. Stamp following. As to the position of the enemy owner after his property is vested in the custodian, his right is not confiscated, since something is left behind in him. If there were nothing left behind there would be confiscation. The custodian's powers could not affect the legal or equitable interest in the property until they were exercised. If the powers end without having been exercised and there is a lawful determination of the custodian's rights, then defeasance will cease to operate. That is what happened here, and the original owner has established his title by the ordinary principles of law: see *Hancock v. Watson*.⁵² An estate or interest is not defeated by anything but defeasance.

The question arises whether, to establish immunity, the Crown interest must be absolute or whether it is sufficient that the Crown has a competing interest. The answer is to be found in *Mersey Docks and Harbour Board Trustees v. Cameron*⁵³ and the cases following it. If the property may be used either for Crown purposes or for some other purpose, that is not enough. Otherwise where there was a divided interest, it would be hard to find where to draw the line. Take the case of a settlement on trust to accumulate the income during the settlor's life, and on his death to transfer the property to his statutory next-of-kin, which might bring in the Crown on a claim to bona vacantia. That would not exempt the property from tax. Nothing less than the whole interest in the Crown can attract exemption.

If one reads the Act and the regulations as a whole, in particular paragraph 4 (3) of the Defence (Trading with the Enemy) Regulations, 1940, it is impossible to suppose that it was contemplated or intended that the property of technical enemies, friendly to this country, should be confiscated.

"Crown purpose" does not mean just what the Crown regards as desirable. If that were so every activity which it approved would come within it. "Crown purpose" means something involved in the traditional activities of the Crown in administering the country. The property in the present case was not Crown money held by a servant of the State administering his functions.

Charles Russell Q.C. in reply. Fundamentally, the bank's

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⁵⁰ [1916] 2 A.C. 307; 32 T.L.R. 624.

⁵² [1902] A.C. 14, 22.

⁵¹ [1918] A.C. 246, 258; 34 T.L.R.

⁵³ 11 H.L.C. 443.

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case is that every activity of the custodian bore the stamp "O.H.M.S.," like his correspondence. He is a public servant or agent of the Crown and was acting in his official capacity as such in creating and receiving the income in question. From the point of view of both his function and status the custodian, when acting as such, comes within the scope of Crown immunity because he was so acting in creating and receiving that income. He is an officer of the executive who received the income in question as a person having Crown status, and who in creating and receiving it was acting for a Crown purpose. All the functions and activities of the office of the custodian are for Crown purposes or purposes of public central government, within the relevant authorities on immunity, in that (a) those functions and activities are part of the machinery of government directed to the making and prosecution of war and the making, at the conclusion of war, of treaties and agreements with other States, and the implementing of those treaties and agreements, and (b) those functions and activities form a part of a machinery of government which is a modernization, albeit an extension of, and supplemental to, the ancient prerogative of withholding from the enemy, or depriving the enemy of, or preventing the obtaining by the enemy of, the sinews of war.

The bank cannot fail in this case unless *Administrator of Austrian Property v. Russian Bank for Foreign Trade* ⁵⁴ is overruled. In that case, the administrator was held to be an agent of the Crown. The Treaty of Peace (Hungary) Order, 1948, is very similar to the Treaty of Peace (Austria) Order, 1920.

The creation and receipt by the custodian of the relevant income were Crown activities notwithstanding that in a subsequent execution or carrying out of those Crown purposes the property and income might become payable to private persons. *In re Munster* ⁵⁵ is of the first importance in this case. One is not here in the realm of private law or private trusts but of property which the executive government through its instrument has put into a sort of public trust. *In re Munster* ⁵⁶ shows that there is then no beneficial owner at any particular time. If the former owner of impounded property is only to get it back as and when and if the impounder decides the former owner has no real ownership left in him. The custodian had the legal title to this property. He had power, if the Crown so directed, to turn it into other

⁵⁴ 48 T.L.R. 37.

⁵⁶ Ibid. 278.

⁵⁵ [1920] 1 Ch. 268.

property (e.g., to invest it). The Crown could confer the beneficial title on anyone it would, at any rate in the case of a sale. It had the power of saying what would happen to the property. No one else had the attributes of ownership which the Crown had. During the relevant period the beneficial rights and interests of the bank were wholly non-existent and did not exist in any real or intelligible sense, and a suspension of all beneficial ownership or interest during the only period relevant to this case involves the non-existence of that ownership or interest during that period.

In the only applicable sense this property was Crown property and Crown income, as only the Crown could deal with it. It is irrelevant that the ways in which the Crown could deal with it were in some degree restrained, for any property held by the Crown is held in a way restricted by the law of England. The fact that in some cases there are fewer limitations does not create a distinction. All the funds disposable by the executive are disposable within the limits imposed by law, whether in the case of the central Exchequer of the United Kingdom or the central fund of India in the past. All are subject to restraints as to how they can be spent.

In the present case, the custodian claimed Crown immunity in relation to the production of documents, although later he waived it. A similar claim was successfully made in *Administrator of German Property v. Knoop*.⁵⁷ If the custodian is within the sphere of Crown immunity for one purpose he must be so for all.

The custodian owed a duty, and was accountable, to the Crown alone. His step was guided by the Crown alone. It makes no difference to assume that temporarily there is a limit to the directions which the Crown might lawfully give him and other Crown servants or agents.

There may be cases in which Crown immunity does not extend to all the activities of some servants of the Crown, as when in their official capacity they are given a trusteeship for private individuals. Thus, the Lord Chancellor is an ex-officio trustee of the British Museum, but as such he would owe a duty to the public using the museum rather than to the Crown. That would be a case of a non-governmental trust.

If the custodian were taxed at all it would be in respect of his receipt of the income. But in receiving it he was fulfilling a duty to the Crown and to no other person. The fact that the property might go back eventually to the original owners was

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⁵⁷ [1933] Ch. 439.

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irrelevant because all the money received by the Crown eventually goes into some private pocket. This income was received in the service of the Crown.

The law of England gave the executive power to constitute for itself an instrument in order the more effectively to fulfil that part of public government which consisted in waging war and implementing international arrangements at the end of it. That instrument was a Crown servant in the public government of the country, a cog in the machinery of government. Though he may have had a wide discretion that does not prevent him from being a servant. The case of *In re Ferdinand, Ex-Tsar of Bulgaria*⁵⁸ shows how completely the trading with the enemy legislation was a replacement of the exercise of Crown prerogative, so that the custodian in receiving the income was fulfilling a public purpose of government. Public government is something of which one could not conceive any part being done by a private body. The custodian is close enough to the central functions of government to come within *Coomber v. Berkshire Justices*.⁵⁹ That case is quite contrary to what Denning L.J. said in the present case.

In *Administrator of Hungarian Property v. Finegold*⁶⁰ the administrator was held to come within Crown immunity. The position of the custodian is essentially the same, and this appeal could not be dismissed without overruling that case. It cannot be said that the custodian has Crown immunity for one purpose but not for another (e.g., income tax payment).

Any statutory provision, such as income tax legislation, which, if it is given effect to, will compulsorily divert to other purposes any part of a fund applicable by the executive for particular purposes must interfere with and thus prejudice the Crown, particularly where, as here, part of the fund is applicable without further reference to Parliament.

See also *R. J. Reuter Co. Ltd. v. Mulhens*⁶¹ and *Perry v. Eames*.⁶²

Their Lordships took time for consideration.

April 1, 1954. LORD MORTON OF HENRYTON. My Lords, the Custodian of Enemy Property for England and Wales (hereafter referred to as "the custodian") was assessed to income tax in respect of income derived from certain investments made by him

⁵⁸ [1921] 1 Ch. 107.

⁵⁹ 9 App.Cas. 61.

⁶⁰ 100 L.J.K.B. 383.

⁶¹ [1954] Ch. 50.

⁶² [1891] 1 Ch. 658.

during a period of nearly 10 years, ending in the year 1950. The custodian paid the tax, amounting to a total of over £70,000. By reason of certain concessions made from time to time since the writ was issued in this action, the only question remaining for decision in your Lordships' House is whether the custodian was bound to pay that tax or whether he could have claimed immunity by the application of the general principle that the Sovereign, by virtue of the prerogative, is exempted from income tax. The custodian was a defendant in the action but is not a party to this appeal.

[His Lordship stated the facts and continued:] One further concession must be mentioned. It is conceded by Mr. Russell for the appellants that the produce or "fruits" of the investments made by the custodian are "annual profits or gains" within the ambit of the charge created by Sch. D. to the Income Tax Act, 1918. They are, it is agreed, annual profits or gains arising or accruing to a person residing in the United Kingdom (viz., the custodian) from property situate in the United Kingdom, within the meaning of paragraph 1 of the Schedule. They would, therefore, *prima facie*, fall within the terms of paragraph 1 of the miscellaneous rules applicable to Sch. D. That paragraph provides that "tax under this schedule shall be charged on and "paid by the person . . . receiving . . . the income in respect of "which tax under this schedule is hereinbefore directed to be "charged," and it is not in dispute that the custodian was the person "receiving" the income in question within the meaning of that provision. It is also agreed that the "fruits," having been derived from the realization of Treasury bills bought at a discount, must be treated as "created income" for income tax purposes and are therefore exempt from the provisions in the Finance Act, 1944, as to the custodian's liability for tax.

In these circumstances it was submitted by the Attorney-General that the burden lay upon the appellants to establish that during the years in question the custodian was entitled to claim immunity from tax under the general principle already mentioned. I think that this submission is clearly well founded.

The custodian was appointed by the Board of Trade in exercise of the power conferred upon that Board by section 7 (1) of the Trading with the Enemy Act, 1939, and it will be convenient at this stage to refer to certain portions of that Act and of regulations subsequently made, which were relied upon as throwing light upon the question whether the custodian was liable to pay income tax during the years in question, or was entitled to claim

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H. L. (E.) Crown immunity from tax. The following provisions appear in the Act of 1939, as amended by the Defence (Trading with the Enemy) Regulations, 1940:—

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Section 2 (1): "Subject to the provisions of this section, the expression 'enemy' for the purposes of this Act means—
" . . . (e) as respects any business carried on in enemy territory, any individual or body of persons (whether corporate or unincorporate) carrying on that business . . ."

Having regard to the definition of "enemy territory" set out below, there is, of course, no doubt that the appellants became "enemy" within this definition, through no fault of theirs, when their country was occupied by the Germans in May, 1940, and their property became "enemy property" within the definition in section 7 (8) quoted hereafter.

Section 7: "(1) With a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace, the Board of Trade may appoint custodians of enemy property for England, Scotland and Northern Ireland respectively, and may by order— . . . (b) vest in the prescribed custodian such enemy property as may be prescribed, or provide for, and regulate, the vesting in that custodian of such enemy property as may be prescribed; . . . (d) confer and impose on the custodians and on any other person such rights, powers, duties and liabilities as may be prescribed as respects—(i) property which has been, or is required to be, vested in a custodian by or under the order, . . . and any such order may contain such incidental and supplementary provisions as appear to the Board of Trade to be necessary or expedient for the purposes of the order. (3) Where, in pursuance of an order made under this section,— . . . (b) any property, or the right to transfer any property, is vested in a custodian, . . . neither the payment, vesting or direction nor any proceedings in consequence thereof shall be invalidated or affected by reason only that at a material time—(i) some person who was or might have been interested in the money or property, and who was an enemy or an enemy subject, had died or had ceased to be an enemy or an enemy subject, or (ii) some person who was so interested, and who was believed by the custodian to be an enemy or an enemy subject, was not an enemy or an enemy subject. . . . (7) All fees received by any custodian by virtue of an order under this section shall be paid into the Exchequer of the United Kingdom. (8) In this section—(a) the expression 'enemy property' means

“ any property for the time being belonging to or held or managed
 “ on behalf of an enemy or an enemy subject; . . . ”

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Section 15 (1): “ In this Act the following expressions have
 “ the meanings hereby respectively assigned to them:— . . .
 “ ‘ enemy territory ’ means any area which is under the
 “ sovereignty of, or in the occupation of, a Power with whom His
 “ Majesty is at war, not being an area in the occupation of
 “ His Majesty or of a Power allied with His Majesty. . . . ”

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Section 16: “ This Act shall be without prejudice to the
 “ exercise of any right or prerogative of the Crown. ”

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This Act was followed by the Trading with the Enemy
 (Custodian) Order, 1939, made by the Board of Trade. It is only
 necessary to quote the following provisions: Paragraph 3: “ (i)
 “ The custodian shall, subject to the provisions of the next
 “ succeeding paragraph and except in so far as the Board of Trade
 “ either generally or in any specific case may otherwise direct or
 “ order, hold any money paid to him under this Order and any
 “ property or the right to transfer any property vested in him
 “ under any vesting order until the termination of the present
 “ war, and shall thereafter deal with the same in such manner as
 “ the Board of Trade shall direct. (ii) The custodian, acting
 “ under a general or special direction of the Board of Trade, may
 “ at any time pay over any particular money paid to him under
 “ this Order or transfer any particular property in respect of which
 “ a vesting order has been made to or for the benefit of the person
 “ who would have been entitled thereto but for the operation of
 “ the Act or any order made thereunder or to any person appear-
 “ ing to the custodian to be authorized by such person to receive
 “ the same. ”

The Defence (Trading with the Enemy) Regulations, 1940,
 made under the Emergency Powers (Defence) Acts, 1939-40,
 contained the following provisions: Regulation 4 (3): “ Notwith-
 “ standing anything in the said section seven, a custodian shall,
 “ if the Treasury so directs, pay or transfer, to such persons as
 “ may be specified in the direction—(a) any money so specified
 “ which has been paid to the custodian as being money which,
 “ but for the existence of a state of war, would have been payable
 “ to or for the benefit of—(i) an individual resident in any enemy
 “ territory which is not under the sovereignty of a Power with
 “ whom His Majesty is at war, or in any area in relation to
 “ which the provisions of the principal Act apply as they apply
 “ in relation to enemy territory. (ii) an individual or body of
 “ persons (whether corporate or unincorporate) carrying on

H. L. (E.) “business in any such territory or area, . . . (b) any property
 1954 “so specified, being property which, or the right of transfer of
 BANK VOOR “which, has been vested in the custodian as being property
 HANDEL EN “belonging to, or held or managed on behalf of, any such
 SCHEEPVAART “individual or body of persons as is mentioned in paragraph (i),
 N.V. “paragraph (ii) or paragraph (iii) of sub-paragraph (a) of
 v. “this paragraph.”

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The provisions which I have quoted sufficiently reveal the position of the custodian, both generally and in relation to the particular property and income now under consideration, and it is only necessary to add that the powers of direction vested in the Board of Trade and the Treasury respectively by these provisions were never exercised in regard to that property and income during the relevant period.

The first of the payments of income tax made by the custodian was a sum of over £44,000 paid in September, 1945. This payment may be taken as an example, since all the payments were made on the same footing, and the question now before the House may be stated in the following terms—the custodian having been assessed to tax in this amount, could he have claimed Crown immunity with success in September, 1945? If he could, the appellants succeed. If he could not, they fail.

Counsel for the appellants called in aid the words of Lord Blackburn (then Blackburn J.) in *Mersey Docks and Harbour Board Trustees v. Cameron*.¹ Lord Blackburn, delivering the opinion of five of the consulted judges, said: “Long series of cases have established that where property is occupied for the purposes of the government of the country, including under that head the police, and the administration of justice, no one is rateable in respect of such occupation. And this applies not only to property occupied for such purposes by the servants of the great departments of State, such as the Post Office, *Smith v. Birmingham Guardians*,² the Horse Guards, *Lord Amherst v. Lord Somers*,³ or the Admiralty, *Regina v. Stewart*,⁴ in all which cases the occupiers might strictly be called the servants of the Crown; but also to property occupied by local police, *Justices of Lancashire v. Stretford Overseers*⁵; to county buildings occupied for the assizes, and for the judges’

¹ (1865) 11 H.L.C. 443, 464–5.

² (1857) 7 El. & B. 483.

³ (1788) 2 T.R. 372.

⁴ (1857) 8 El. & B. 360.

⁵ (1858) El.Bl. & El. 225.

“ lodgings, *Hodgson v. Local Board of Health, Carlisle* ⁶; or occupied as a county court, *Regina v. Manchester Overseers* ⁷; or for a jail, *Regina v. Shepherd*.⁸ In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign, so as to make the occupation that of Her Majesty; but the purposes are all public purposes, of that kind which, by the constitution of this country, fall within the province of government, and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered in *consimili casu*. And the decisions are uniform, and were not disputed at the Bar, that the exemption applies so far; but there is a conflict between the decisions as to whether the exemption goes further.”

Much of the argument in this House and in the courts below centred round the question whether the custodian was “ strictly a servant of the Sovereign ” or was a person who could be “ considered in *consimili casu*.”

My Lords, having regard to the reasons for his appointment, the nature of his duties, and the control exercised over him by the Board of Trade, I incline to the view that he was a servant of the Crown; but it is unnecessary for me to pursue this matter further, because I am satisfied that even upon this footing the appellants must fail. A servant of the Crown cannot claim immunity from tax in all cases merely because he is a servant of the Crown. He claims immunity on behalf of the Crown, not on his own behalf, and it is, of course, clear that he cannot claim immunity in respect of income arising from his own private investments. It is equally clear that he can claim immunity if the income in question forms part of the personal revenue of the Sovereign, but, in my view, he can only claim immunity in respect of other income if he can show that such income is wholly applicable for “ the purposes of the government of the country,” to quote again Lord Blackburn.

No one of the “ long series of cases ” to which Lord Blackburn alludes directly covers the point now in issue, as they were all cases dealing with the occupation of property, but I think that the opinion which I have just expressed is a logical deduction from these cases and from the decision of this House in *Coomber v. Berkshire Justices*.⁹

If the custodian had tried to resist payment of income tax in September, 1945, could he have established that the income in

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⁶ (1857) 8 El. & Bl. 116.

⁷ (1854) 3 El. & B. 336.

⁸ (1841) 1 Q.B. 170.

⁹ (1883) 9 App.Cas. 61.

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question was wholly applicable for the purposes of the government of the country? In agreement with the Court of Appeal, I am satisfied that he could not. In *In re Munster*¹⁰ Russell J. had to consider the position under the trading with the enemy legislation passed during the first world war. He held that the custodian was not assessable to super-tax as agent or receiver for an "enemy" whose property in this country had been vested in the custodian and produced a substantial income. In the course of his judgment the learned judge said¹¹: "in my judgment . . . pending its disposition by Order in Council after the determination of the war, the property is removed from the control and from the beneficial ownership of the enemy. At the termination of the war fresh considerations will arise; and whether the enemy will recover, and to what extent he will recover, the beneficial ownership will depend upon the arrangements made at the conclusion of peace (referred to in the preamble) and upon the terms of any Order in Council, made, I doubt not, with those arrangements in view, under section 5." Later, after dealing with one objection which had been raised against this view of the Act, he continued¹²: "The second objection urged against this view of the Act of 1914 is that it involves the existence of a period of time during which there is no beneficial owner of the property and that this state of affairs is contrary to ordinary legal conceptions and principles. That is quite true, but it is the result of a statute which, in my judgment, causes the beneficial ownership to be and remain in statutory suspense or abeyance during the period in question, during which period the custodian has certain limited powers of dealing with the property."

The view just expressed was applied to the recent trading with the enemy legislation by Simonds J. (as he then was) in *In re Gourju's Will Trusts*,¹³ and again in *In re Ring Springs Ltd.'s Letters Patent*,¹⁴ where he referred to the position as "anomalous"—otherwise almost unknown to our law," and by the Court of Appeal in *In re Pozot's Settlement Trust*.¹⁵

I agree with the comment of the Master of the Rolls in the present case that¹⁶: "The conception of beneficial rights being 'in suspense' is no doubt at first sight somewhat strange and

¹⁰ [1920] 1 Ch. 268; 36 T.L.R. 173.

¹¹ [1920] 1 Ch. 268, 277-8.

¹² Ibid. 279.

¹³ [1943] Ch. 24, 29; 59 T.L.R. 47; [1942] 2 All E.R. 605.

¹⁴ [1944] Ch. 180, 185; 60 T.L.R. 234; [1944] 2 All E.R. 421.

¹⁵ [1952] Ch. 427, 440; [1952] 1 T.L.R. 1042; [1952] 1 All E.R. 1107.

¹⁶ [1953] 1 Q.B. 248, 287; [1952] 2 T.L.R. 861; [1952] 2 All E.R. 956.

"novel," but I accept, as he did, the reasoning of Russell J. in *In re Munster*,¹⁷ and I think it is equally applicable to the legislation now under consideration. Immediately before the vesting order was made in 1940 the property which was the source of the income in question belonged beneficially to the appellants. Their beneficial interest was "suspended," and in September, 1945, the custodian could not tell whether the beneficial interest in the capital or the income, or both, would ultimately be restored to the appellants, or transferred to other persons. Either of these events might result from a direction of the Board of Trade under paragraph 3 of the Trading with the Enemy (Custodian) Order, 1939, or from a direction of the Treasury under regulation 4 (3) of the Defence (Trading with the Enemy) Regulations, 1940, or from "arrangements to be made at the conclusion of peace," to quote section 7 of the Trading with the Enemy Act, 1939. I am prepared to assume that the income in question might have been paid into the Treasury at a later date, in pursuance of some such direction or arrangement, but even on this assumption it was, in my view, impossible for the custodian to show that it was Crown income in September, 1945. It was in fact income which belonged to nobody at that date; all beneficial interests were suspended, and at that date the custodian had no power to apply it to any purpose whatsoever, public or private. His duty was simply to hold it. In these circumstances, as the income admittedly came within the words of the taxing provisions of the income tax legislation, and as the custodian was admittedly the "person" "receiving the income," within these provisions, I can see no grounds upon which he could have discharged the burden which lay upon him of proving Crown immunity. Thus, the only question arising on this appeal must be answered in favour of the respondent.

Ordinarily, a Crown servant, whose duties involve the holding of property and the receipt of income in that capacity, would be holding Crown property; but the custodian is a Crown servant of a most unusual kind, appointed temporarily in a time of great emergency. Property belonging to private persons—some of them enemies, some of them friends whose country has been overrun by enemies—is vested in him. He is told: "You are to keep this property until you are instructed to transfer it to someone. That someone may be the person whose property has just been vested in you, and whose beneficial ownership is suspended

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H. L. (E.) “ meanwhile. It may, however, be another person. Meanwhile,
 1954 “ you will receive the income from the property or invest it to
 “ produce income if it is at present unproductive, and simply hold
 BANK VOOR “ all income until further instructions are given to you.” I think
 HANDEL EN “ it would never occur to such a servant to claim that such income
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 v. occurred to the custodian to do so, and I think he was quite right.

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The conclusion which I have reached is not, in my view, inconsistent with any of the authorities cited in argument. In *Administrator of Austrian Property v. Russian Bank for Foreign Trade*,¹⁸ the question whether the administrator was liable to pay income tax on the income produced by any property which might be vested in him from time to time did not arise for decision, and I do not know what view the Court of Appeal would have taken on that question. Nor have I formed any view as to whether the recent case of *R. J. Reuter Co. Ltd. v. Mulhens*¹⁹ was or was not rightly decided. I am prepared to assume in favour of the appellants that the powers of the Board of Trade were as wide as they were held to be in that case; on that assumption, I am still of opinion that this appeal should be dismissed for the reasons which I have stated. I say no more about *Reuter's* case²⁰ as I understand it may come before your Lordships' House on appeal.

I would dismiss the appeal.

LORD REID. My Lords, the appellant, a Dutch company the shares of which were owned by a Hungarian, was held to have become an enemy within the meaning of the Trading with the Enemy Act, 1939, because, and only because, it continued to trade in Holland after the German occupation of that country. It owned certain gold bars in this country, and under orders of the Board of Trade these bars were vested in the Custodian of Enemy Property and were sold by him. He invested the proceeds from time to time in Treasury bills. The profits from these investments were assessed to income tax in his hands, and he paid the tax. Admittedly the sole question now before your Lordships is whether he was liable to pay that tax. The developments by which that became the question at issue in this case were peculiar, and detailed consideration of those developments does not assist me towards the decision of this question. I think it

¹⁸ (1931) 48 T.L.R. 37.

²⁰ *Ibid.*

¹⁹ [1954] 1 Ch. 50; [1953] 2 All E.R. 1160.

unnecessary to say more about them than that the artificialities which have been introduced into this case by the form of the concession made by the Crown before Devlin J. are such that they may well require a decision by your Lordships which is difficult to reconcile with common sense.

The custodian was liable to pay income tax on the income received by him unless he was entitled to rely on the royal prerogative and plead Crown immunity as an answer to the assessments made on him. The first question to be determined is whether the custodian is a servant of the Crown who can plead Crown immunity or, if not, whether he is a person in consimili casu with such a Crown servant. If he does not come within either of those classes then the case is at an end and the respondent succeeds. But if he does, then it is argued that the question still remains whether the circumstances of this case are such as to warrant the plea of Crown immunity. One of the peculiarities of this case is that it is the Attorney-General on behalf of the respondent who seeks to limit the application of the royal prerogative.

It is said that the Income Tax Acts do not bind the Crown, and that is undoubtedly true at least to this extent: tax is not payable in respect of income received by the Sovereign, nor is it payable in respect of Crown income received on behalf of the Crown by a servant of the Crown in the course of his official duties. But the authorities show that it is a difficult matter to determine who is to be regarded as a servant of the Crown in this connexion. And it may also be a difficult matter to determine whether a servant of the Crown can plead immunity from tax in respect of all income which it happens to be part of his duty to receive, or whether it is also necessary that the income should in some sense be Crown income, or applicable for Crown purposes.

The starting point of any discussion of these questions must be three decisions of this House: *Mersey Docks and Harbour Board v. Cameron*²¹; *Greig v. Edinburgh University*,²² and *Coomber v. Berkshire Justices*.²³ In the *Mersey Docks* case²⁴ a non-profit earning statutory corporation claimed immunity from local rates, in *Greig's* case²⁵ a similar claim was made by a university, and in *Coomber's* case²⁶ the justices claimed immunity from income tax under Schedule A. So none of these

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²¹ 11 H.L.C. 443.²² (1868) L.R. 1 Sc. & D. 348.²³ 9 App.Cas. 61.²⁴ 11 H.L.C. 443.²⁵ L.R. 1 H.L.(Sc.) 348.²⁶ 9 App.Cas. 61.

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cases was concerned with a servant of the Crown in any ordinary sense, and in each the immunity claimed was from taxation or rating in respect of the occupation or ownership of land. Though these decisions do not govern this case, speeches in all of them contain statements of principle which may be of decisive importance: but in examining those statements one must always, I think, bear in mind the nature of the issue in these cases.

In the *Mersey Docks* case²⁷ the sole question was whether a corporation not subject to control by the Crown or by a Minister, and whose revenues were not Crown revenues, could claim Crown privilege on the ground that it was performing a public duty. Blackburn J. gave a long opinion for the majority of the consulted judges. He recognized that a long series of cases had established that where property though not in Crown occupation is occupied for the purposes of the government of the country no one is rateable in respect of such occupation, and said²⁸: "In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign, so as to make the occupation that of Her Majesty; but the purposes are all public purposes, of that kind which, by the constitution of this country, fall within the province of Government, and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign might be considered in consimili casu." I have found no indication that he thought that, if immunity is claimed on behalf of the Crown by an actual servant of the Crown, the right to immunity depends on whether the claim is made by a superior or by a subordinate servant of the Crown, or depends on the purpose for which the Crown proposes to use the property.

Lord Westbury L.C., in the course of his speech, said²⁹: "The only occupier exempt from the operation of the Act is the King because he is not named in the statute, and the direct and immediate servants of the Crown, whose occupation is the occupation of the Crown itself, also come within the exemption." The use of the phrase "direct and immediate servants" has given rise to an argument that Lord Westbury meant to distinguish between highly placed servants like Ministers and subordinate servants. I do not so read his words. He was contrasting those who were in fact servants of the Crown with those, like the *Mersey Docks* Board, who were not. He had no occasion to contrast one grade of actual servants with another:

²⁷ 11 H.L.C. 443.

²⁸ Ibid. 465.

²⁹ Ibid. 501-2.

he cannot have intended to deny the right of any servant of the Crown to assert the Crown's rights on the Crown's behalf, and by "the direct and immediate servants of the Crown, whose "occupation is the occupation of the Crown itself" he appears to me simply to have meant those whose position under the Crown is such that their occupation is the Crown's occupation. Lord Cranworth said ³⁰: "The Crown not being named is not "bound by the Act. It follows therefore, that lands or houses "occupied by the Crown or by servants of the Crown for the "purposes of the Crown are not liable to be rated; and I conceive "that it is from a confusion between property occupied for public "purposes, and property occupied by servants of the Crown, that "this mistake has arisen." Lord Cranworth apparently regarded all servants of the Crown as having the same right to claim exemption.

Greig's case ³¹ so closely resembled the *Mersey Docks case* ³² that there is little in it that is new. But, in view of the importance sought to be attached to the words "direct and "immediate" servants of the Crown used by Lord Westbury in the *Mersey Docks case*, ³² I think it well to quote what Lord Westbury said in *Greig's case* ³³: "The true ground of exemption "was ascertained and expressed by this House in the *Mersey "Docks case* ³⁴: and it was found to rest altogether upon this fact, "that the poor laws did not include the Crown, the Crown not "being named in the statute. The result therefore was that "Crown property, and property occupied by the servants of "the Crown, and (according to the theory of the constitution) "property occupied for the purposes of the administration of the "government of the country, became exempt from liability to "poor rate." There is no distinction there between different grades of servants of the Crown.

In *Coomber's case* ³⁵ it was decided that immunity from income tax under Schedule A is similar to immunity from poor rates. Lord Blackburn said ³⁶ that the Act showed no intention to impose tax on property belonging to the Crown and did not take away "the exemption, by virtue of the prerogative, of property "actually occupied or enjoyed by the Crown." He then said ³⁷ that the administration of justice, the preservation of order, and the prevention of crime are functions "that by the constitution of

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³⁰ 11 H.L.C. 443, 508.

³¹ L.R. 1 Sc. & D. 348.

³² 11 H.L.C. 443.

³³ L.R. 1 Sc. & D. 348, 354.

³⁴ 11 H.L.C. 443.

³⁵ 9 App.Cas. 61.

³⁶ Ibid. 66.

³⁷ Ibid. 67.

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 1954 and after discussing earlier cases he added ³⁸: “ I do not say that
 ——— “ the assize courts, maintained by the county for the administra-
 BANK VOOR “ tion of the Queen’s justice in the Queen’s court, are quite so
 HANDEL EN “ clearly occupied by the servants of the Crown as those courts
 SCHEEPVAART “ which are maintained by the Woods and Forests out of the
 N.V. “ general revenue of the country. Nor do I say that the police
 v. “ station, maintained by the county for the maintenance of the
 ADMINIS- “ police, is quite so clearly occupied by the servants of the Crown as
 TRATOR OF “ a barrack maintained for soldiers, and paid for out of the general
 HUNGARIAN “ revenues of the country. But I think there is great reason
 PROPERTY. “ for saying that both are maintained for the purposes of the
 ——— “ administration, or those purposes of the Government which are,
 Lord Reid. “ according to the theory of the constitution, administered by the
 ——— “ Sovereign.” The only passage in Lord Watson’s speech which
 I think it necessary to quote is one in which he deals with a part
 of the speech of Lord Westbury in the *Mersey Docks* case.³⁹
 Lord Watson said ⁴⁰: “ The precise language of that definition
 “ satisfies me that the noble and learned Lord meant to affirm,
 “ and did affirm, that the exemption extended not only to the
 “ immediate and actual servants of the Crown but to all other
 “ persons, not being servants of the Crown, whose occupation was
 “ ascribable to a bare trust for purposes required and created by
 “ the Government of the country. And, seeing that, in my opinion,
 “ the administration of justice, the maintenance of order, and the
 “ repression of crime, are among the primary and inalienable
 “ functions of a constitutional government, I have no hesitation
 “ in holding that assize courts and police stations have been
 “ erected for proper government purposes and uses, although the
 “ duty of providing and maintaining them has been cast upon
 “ county or other local authorities.” This appears to me to make
 it clear that Lord Watson thought that the distinction was
 between those who were actual servants of the Crown and those
 who were not, and that he understood Lord Westbury as having
 drawn the same distinction. I can find no trace in *Coomber’s*
 case ⁴¹ of any distinction between different grades of servants of
 the Crown or of any idea that there may be actual servants of the
 Crown whose grade is such that they cannot plead the immunity
 of the Crown in the ordinary way.

In my opinion, there is nothing in these cases which requires us to limit the class of servants of the Crown to Ministers and

³⁸ 9 App.Cas. 61, 69-70.

³⁹ 11 H.L.C. 443.

⁴⁰ 9 App.Cas. 61, 74.

⁴¹ 9 App.Cas. 61.

the like or to exclude subordinate servants of the Crown. Those in consimili casu are typically bodies like the justices independent of the Crown asserting Crown privilege not for the benefit of the revenues of the Crown but for the benefit of their own revenues in order that the functions which they are carrying out shall not be prejudiced, and it is easy to see why such independent bodies can only be permitted to claim Crown privilege in respect of a very limited class of functions, and only if the property or money in respect of which immunity is claimed is wholly devoted to those functions. But the case of a subordinate servant of the Crown is very different. If a Minister receives income to be used in the service of the Crown it does not matter whether the purposes for which it is to be used are or are not purposes which if carried out by independent bodies would put them in consimili casu with servants of the Crown: in all cases he can claim Crown immunity. And I can see no possible reason why, if a subordinate servant of the Crown receives income to be used in the service of the Crown, he should not be entitled to assert the same privilege. Neither the Minister nor the subordinate asserts the privilege on his own behalf: both assert it on behalf of and for the benefit of the Crown. If that is not so, and a subordinate servant of the Crown is subject to the same limitations as an independent body in claiming immunity, then what happens if it is part of the duty of the subordinate to receive money to be used in the Crown's service but for a purpose which would not entitle an independent body to the privilege? Is the Crown to be prejudiced because it so happens that its money is payable to a subordinate instead of to a holder of high office? Such considerations make me unwilling to hold that there is any essential difference between superior and subordinate servants of the Crown unless I am compelled to do so. It was not necessary to consider the position of a subordinate servant in any of the cases decided in this House, and I do not think that in fact it was separately considered. I think we are free to hold that there is no such essential distinction.

I do not get much assistance in this matter from the later cases which were cited. None of these cases involved a claim for immunity by an actual servant of the Crown. In most of them the claim for immunity was made by some body more or less closely associated with the Government or with the performance of functions of a governmental character, and in all of them the issue appears to me to have been whether the status, duties or functions of the claimant were such as to entitle the claimant to

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be regarded as in consimili casu with servants of the Crown. Some of them deal with the degree of control exercised over the claimant by the Government, and I shall have to examine them from that point of view, but if I come to the conclusion that the custodian is an actual servant of the Crown I shall find it unnecessary to consider what puts a person or body in consimili casu with such a servant. I shall, therefore, turn to the question whether the custodian is a servant of the Crown. But I think I ought to say that my silence as to these cases must not be taken to imply that I have formed an adverse view about any of them.

It was suggested by Devlin J. at one point in his judgment in this case that there is now no such thing as a servant of the Crown in the strict sense. I cannot agree. Ministers are pre-eminently Her Majesty's servants: a purist might find some anomaly in that because by constitutional practice the Sovereign can only act on the advice of a Minister. But no one denies that Ministers come within the category of servants of the Crown for the present purpose. And with regard to others I can see no difficulty at all. The Crown (through or with the advice of a Minister) controls them and directs their activities in a way which to my mind makes the term "servant" quite appropriate.

In my judgment the question whether the custodian is a servant of the Crown depends on the degree of control which the Crown through its Ministers can exercise over him in the performance of his duties. The fact that a statute has authorized his appointment is, I think, immaterial, but the definition in the statute of his rights, duties and obligations is highly important. In the ordinary way a civil servant's duties are not prescribed, though his salary may be fixed in Parliament, and I have no doubt that he is a servant of the Crown. But when a statute creates an office it may give to the holder more or less independence from ministerial control so that the officer has to a greater or less extent a discretion which he alone can exercise, and it may be that the grant of any substantial independent discretion takes the officer out of the category of servants of the Crown for the present purpose. But I cannot find that the custodian has any such independent discretion. His appointment was authorized by the Trading with the Enemy Act, 1939, s. 7. He does not determine what property is to vest in him and he cannot control its disposal. Section 7 (1) (d) gives to the Board of Trade very wide powers to impose duties and liabilities on the custodian, and the subsection further entitles the Board of Trade to put in

its order such incidental and supplementary provisions as appear to the board to be necessary. It is true that by section 7 (1) (f) it is left to the custodian to determine what returns, accounts and other information he requires; but that appears to me to be a minor matter and, indeed, it may be that even then the Board of Trade could give him directions. I have not found anything else in the Act which gives him any independence. Not only has he no discretion as to the disposal of property or funds which have been vested in him, but he can be directed as to how he is to invest funds while in his hands. It may be that directions cannot (in theory at least) be given to him informally but must be given by formal order, but that cannot, in my opinion, make a difference. Further, he is given power to sue for and recover moneys payable to him under the Trading with the Enemy (Custodian) Order made by the Board of Trade, but that does not appear to me to be important, because it would seem that the Board of Trade can control his exercise of this power.

It may be that in practice the custodian is given fairly wide discretion. A master often gives wide discretion to his servant. The question is not how much independence the custodian in fact enjoys but how much he can assert and insist on by reason of the terms of his appointment or the nature of his office. In view of the need during the war for widespread Government control it would be rather surprising to find that the custodian had to any material degree been exempted from direct and immediate control, and in fact I do not think that he was.

I find support for the views which I have expressed in two judgments of the Privy Council where the questions were whether debts due to certain boards closely connected with the Government were entitled to priority as Crown debts. In *Fox v. Government of Newfoundland*⁴² Sir R. Couch examined the powers of the board which claimed this right, and said that they "indicate that it [the board] is not to be a mere agent of the Government for the distribution of the money, but is to have within the limit of general educational purposes a discretionary power in expending it—a power which is independent of the Government." And in *Metropolitan Meat Industry Board v. Sheedy*⁴³ Lord Haldane said: "Their Lordships agree with the view taken by the learned judge in the court below that no more are the appellant board constituted under the Act of 1915 servants of the Crown to such an extent as to bring

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⁴² [1898] A.C. 667, 672.

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⁴³ [1927] A.C. 899, 905; 43 T.L.R. 701.

H. L. (E.) “ them within the principle of the prerogative. They are a body
 1954 “ with discretionary powers of their own. Even if a Minister of
 BANK VOOR “ the Crown has power to interfere with them, there is nothing
 HANDEL EN “ in the statute which makes the acts of administration his as
 SCHEEPVAART “ distinguished from theirs. That they were incorporated does not
 N.V. “ matter. It is also true that the Governor appoints their
 v. “ members and can veto certain of their actions. But these
 ADMINIS- “ provisions, even when taken together, do not outweigh the
 TRATOR OF “ fact that the Act of 1915 confers on the appellant board wide
 HUNGARIAN “ powers which are given to it to be exercised at its own
 PROPERTY. “ discretion and without consulting the direct representatives of
 Lord Reid. “ the Crown.” I can find no such independent powers or
 “ discretions committed to the custodian.

I therefore hold that the custodian is a servant of the Crown, and it is clear that he received this income in the course of his official duties. The appellant argues that that is enough to establish the right to claim immunity from tax. The respondent, on the other hand, argues that that is not at all conclusive and that what really matters is the character of the income: if the income is Crown income then tax is not due, but if it is not and it is only received by the custodian to be held until the time comes to pay it to some private person, then there is no immunity from tax. I am bound to say that this appears to me to be reasonable and not in conflict with any of the decisions, and I am prepared to assume that if a case arose in which it was the duty of a Crown servant merely to hold property with accruing income for a period and then to pay it to some as yet unascertained private person, it would be held that tax is payable on the income accruing. That would be because in such a case payment of tax could not possibly prejudice any Crown interest or purpose.

While it may be that a Crown servant could not claim Crown immunity in respect of his performance of statutory duties which served no Crown purpose at all, I can find nothing to justify the argument that Crown immunity can only be claimed by the Crown (or its servants on its behalf) if it is required to protect some direct or financial interest of the Crown; and still less can I find any support for the argument that immunity cannot be claimed by the Crown unless the Crown alone is interested in the benefit which it will bring. I have already said that there is, in my view, an essential difference between the immunity of the Crown itself and immunity which may be claimed by independent bodies on the ground that they are performing functions of

a governmental character. There is every reason for strictly limiting the right of such bodies to claim immunity, but I can see no ground for applying those limits to the Crown itself. If an Act of Parliament does not bind the Crown then the Crown can claim immunity from its provisions whether its interest to obtain immunity in a particular case is large or small or direct or indirect.

In *Administrator of Austrian Property v. Russian Bank for Foreign Trade*⁴⁴ the administrator was held to be an agent of the Crown. It was his duty to collect debts due to Austrian nationals, and he would have failed in this action unless he was entitled to plead immunity from the provisions of the Statute of Limitations. The money which he received was not to go to the Crown: it was to go at least in the first instance to meet claims by British subjects against Austrian nationals, and it does not appear that in any event funds received by the administrator would have been applied for the benefit of the Crown. But it was not even suggested that this was a reason for denying to the administrator the right of a Crown servant to plead Crown immunity from the Act. It was enough that in carrying out his duties the administrator was fulfilling a Crown purpose. Scrutton L.J. said⁴⁵: "The administrator, being an agent of the Crown, under the prerogative is not bound by the Statute of Limitations": and Greer L.J. said⁴⁵: "Unless the Crown has in some way been deprived of the right to say: 'The Statute of Limitations does not affect a claim by the Crown,' then the appeal must fail." In my opinion that case was rightly decided, and I can see no difference in principle between Crown immunity from the provisions of the Statute of Limitations and Crown immunity from the provisions of the Income Tax Acts. In either case a Crown servant fulfilling a Crown purpose can claim that immunity whether or not the resulting financial benefit is to go to the Crown.

I now turn to consider the legal position of property vested in the custodian and the rights of the Crown with regard to it in order to see whether at the relevant time the Crown had any interest in the matter. At first sight it might seem sufficient to say that, whatever the position may have been during the war, the income has now come to belong to the appellant and the Crown's interest in it was at best potential: but for two reasons I cannot accept that simple way out of the difficulty. In the first place, the income only came to belong to the appellant

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⁴⁴ 48 T.L.R. 37.⁴⁵ Ibid. 39.

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through the act of the Crown, and, secondly, the question before the House is whether the custodian was liable to pay income tax, and liability to pay tax must be determined when the assessment is made or appealed against, and in the light of the facts then existing. I do not think that it was disputed that we must look at the position in, say, 1948, when the question would have arisen if the custodian had realized that he might be entitled to claim immunity from income tax. It seems fairly obvious that, if anyone had thought of that at the time, the Board of Trade would have given directions to the custodian that any immunity was to be waived and the tax was to be paid. If that had been done I do not see how any question like the present could have arisen. But we are compelled to decide this case on the basis of what would have happened if the custodian (in effect the Board of Trade) had determined to rely on the Crown's immunity.

The legal position of property vested in the custodian was considered by Russell J. in *In re Munster*.⁴⁶ That case was decided under the corresponding legislation for the 1914 war and dealt with property of an enemy subject, but there is no relevant difference between that legislation and the 1939 Act, and the Act makes no distinction between vesting of property of enemy subjects and vesting of property of British subjects or subjects of Allied Powers who temporarily became technically "enemies": so the decision and the reasoning in *In re Munster*⁴⁶ are still applicable. In that case property which had belonged to Prince Munster was vested in the custodian and income from it was received by the custodian. The Revenue claimed super-tax on that income, but this claim failed because it was held that on being vested in the custodian the property was removed from the beneficial ownership of its former owner, and therefore the income from it was not his income. Russell J. held⁴⁷ that while the property was so vested the beneficial ownership of it was in "statutory suspense or abeyance," and he pointed out that whether Prince Munster would recover, and to what extent he would recover, the beneficial ownership would depend on the arrangements to be made at the conclusion of peace. It is, to say the least, unusual that beneficial ownership should be in suspense or abeyance, and there has been much discussion of the question whether the original owner has only a hope or expectation that he will get his property back or whether he retains some shadowy legal right in or to his former property. I think that that question

⁴⁶ [1920] 1 Ch. 268.

⁴⁷ *Ibid.* 279.

is only academic: whatever the answer to it may be, he cannot, even after he ceases to be an enemy, either sue for the property or assert any right to it. He must wait until something is done either by Act of Parliament or by the Crown to restore his property to him. It was only by an accident that the present appellants were able to raise the present action.

The Crown also has no beneficial right to property while it is in the hands of the custodian, and if one were not to look further than that it might well be that the Crown (or the custodian on its behalf) could not claim that income accruing to the custodian was immune from tax. But I think one must look further. If the Crown had the right at any time to direct the custodian to hand over the property (including accrued income) so that it could be disposed of as the Crown might determine, then I would have no doubt that the Crown had an interest in the income sufficient to entitle it to claim exemption from tax. But if, on the other hand, the Crown had no such right either during or after the war, and the ultimate disposal of the property vested in the custodian had to be determined by Act of Parliament, then I would hold that income accruing to the custodian was taxable. So it is necessary to examine the relevant legislation to see what the Crown's right was.

The nature of the Crown's interest in, or right to deal with, the income must depend in the first place at least on the true construction of the Trading with the Enemy Act, 1939, and in particular section 7 of the Act. The construction of this section was one of the matters involved in the decision of the Court of Appeal in *R. J. Reuter Co. Ltd. v. Mulhens*,⁴⁸ and in that case leave to appeal to this House has been granted. It would be improper to prejudge any of the issues in that case unless that is necessary for the decision of the present case. If the view taken by the Court of Appeal on this question is wrong, the power of the Board of Trade is more restricted than if the Court of Appeal is right. So if I find that, even supposing the Court of Appeal to be wrong, there was still a sufficient interest in the Crown to support Crown immunity, a fortiori there would be a sufficient interest if the Court of Appeal is right, and I need not consider which is the correct view.

Section 7 (1) of the Act of 1939 provides that: "With a view
"to preventing the payment of money to enemies and of pre-
"serving enemy property in contemplation of arrangements to be

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⁴⁸ [1954] Ch. 50.

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“made at the conclusion of peace” the Board of Trade may appoint custodians of enemy property and vest in them such enemy property as may be prescribed, and may as respects that property confer on the custodians such rights and powers as may be prescribed. “Enemies” include all persons residing in enemy territory (section 2 (1) (b)); and “enemy territory” includes any area in the occupation of a Power with whom His Majesty is at war (section 15 (1)). So in construing section 7 it must be borne in mind that enemy property includes not only the property of enemy subjects but also the property of British subjects or friendly aliens who continued to reside in, say, Holland or the Channel Islands during the German occupation. I assume for the purpose of the present argument that the provisions of section 7 are governed by the initial words which I have quoted, and I assume further that section 7 did not entitle the Board of Trade during the war to confiscate property of British subjects or friendly aliens who were only enemies by virtue of their place of residence, or otherwise to make it impossible for their property to be returned to them when they ceased to be “enemies.” And I shall further assume that this applied not only to the property vested in the custodian but also to income from that property received by the custodian. But I rather hesitate to make this assumption in view of the second matter decided by Russell J. in *In re Munster*.⁴⁹ Under the Act of 1914 the court had power to give directions to the custodian. Under the Act of 1939 that power is vested solely in the Board of Trade, but the extent of the power appears to be the same. Having decided that super-tax was not due, Russell J. held that he had power to direct the custodian to pay to the Treasury out of the property which had belonged to Prince Munster a sum equivalent to what would have been payable if tax had been due. If that decision is right the Board of Trade during the last war could have directed payments to be made in lieu of surtax. If, notwithstanding the initial reference in section 7 to preservation of enemy property, the Crown through the Board of Trade could use the general powers conferred by section 7 to direct payments out of enemy property when no debt was due, then I have some difficulty in seeing what limit there is to the exercise of that power or what there was to stop the Board of Trade from directing that still greater sums should be paid away and used for Crown purposes. But I shall not pursue that matter, and I shall still assume

⁴⁹ [1920] 1 Ch. 268.

that the Crown were not entitled under the Act of 1939 to take enemy property during the war and use it for Crown purposes. I shall not deal with any of the Statutory Orders made by the Board of Trade under the Act of 1939 because they could not confer wider powers than the Act authorized. But I must notice the Defence (Trading with the Enemy) Regulations because they have the force of an Act of Parliament. Regulation 4 (3) authorizes the Treasury to direct the custodian to pay to such person as may be specified money which, but for the war, would have been payable to persons resident in enemy occupied territory, but it does not authorize any such direction in the case of persons resident in territory under enemy sovereignty. So the regulation did not in general apply to enemy subjects but it did apply to those British subjects and friendly aliens who became "enemies" temporarily while their place of residence was in enemy occupation. The regulation cannot have been intended to put them in a worse position than enemy subjects, and one of its purposes must have been to release their property and return it to them on their ceasing to reside in enemy occupied territory either because they had escaped or because their place of residence had been reoccupied by Allied forces.

But it is necessary to look not only at the powers of the Government during the war to deal with property vested in the custodian but also at the position on the conclusion of peace. Section 7 of the Act of 1939 provided that enemy property was to be preserved "in contemplation of arrangements to be made at the conclusion of peace." If that provision meant that arrangements for the disposal of property vested in the custodian could only be made by a later Act of Parliament, and if the Act of 1939 conferred no power on the Crown to make arrangements, then I would hold that the Crown had no interest in that property at the relevant date. But I do not think that that is the meaning of the Act of 1939. "Arrangements" is not a word which I would expect to be used if the intention was that only a further Act of Parliament could authorize the disposal of the property, but it appears to me to be an appropriate word if the intention was to empower the Crown to make arrangements. The case of the *Administrator of Austrian Property*⁵⁰ shows that after the 1914 war arrangements for the disposal of the former property of enemy subjects were made by the Crown in peace treaties. It is

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⁵⁰ 48 T.L.R. 37.

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true that such arrangements were confirmed by Acts of Parliament, but we were not referred to any Act of Parliament which made or confirmed arrangements for the disposal of property vested in the custodian which had formerly belonged to British subjects or friendly aliens, and I do not think that the Act of 1939 can be read as meaning that such property could only be taken out of the hands of the custodian and disposed of by some later Act of Parliament. And if the Crown had power to make the necessary arrangements, can it be said that its power was limited to making arrangements which would ensure that every item of property in the hands of the custodian was returned to its former owner? I think that it must be held that the Crown had some wider power of arrangement and disposal than that. There was certainly no obligation, in the case of enemy subjects, to return all property to its former owner, and the Act makes no distinction in this matter between enemy property formerly owned by enemy subjects and enemy property formerly owned by British subjects or friendly aliens. Accordingly, I cannot think that it was illegal for the Crown to make arrangements by which former property of British subjects or friendly aliens might not all be returned to them. For example, I do not think that it was illegal for the Crown to make arrangements with an Allied Government for the disposal of property formerly owned by subjects of that government in terms which did not ensure that each item of property was returned intact to its former owner. It is true that one would not readily assume in peace time that an Act of Parliament conferred power of this character on the Government, but this was emergency legislation. If my interpretation of this enactment is correct, then I think that making such arrangements was a Crown purpose which gave the Crown a sufficient interest to invoke its immunity if it chose to do so, and the case of *The Administrator of Austrian Property*⁵⁰ appears to me to be good authority for this. I will only add that if the view of the Act of 1939 taken by the Court of Appeal in *R. J. Reuter Co. Ltd. v. Mulhens*⁵¹ is right, then I would have no doubt at all that the Crown had a sufficient interest to entitle it to claim immunity from tax on income received by the custodian.

It is here that the artificiality of the issue now before your Lordships presses upon me. By reason of the concession made by the Crown before Devlin J., we have now to decide whether the custodian was liable to pay income tax. Undoubtedly he

⁵⁰ 48 T.L.R. 37.

⁵¹ [1954] Ch. 50.

would have had to pay if the Crown had waived its immunity and if he had been directed to pay by the Board of Trade; and if such a direction had been given the appellants would have had no ground for complaint and certainly they could have made no effective protest either then or now. But in fact no such direction was given to the custodian, and the Attorney-General expressly refused to rely on any consideration of this kind. One of the arguments of the Attorney-General was that it is inconceivable that the Crown would have taken any other course than to return the appellants' property to them and therefore, whatever the theoretical right or interest of the Crown might be, in fact the Crown had no sufficient interest to support a claim for immunity. But if that be so, it is equally inconceivable that the Crown would ever have attempted to assert its immunity because the only effect of successfully asserting immunity would have been to enable the appellants to receive accrued income which had not borne tax. Nevertheless, by reason of the form of the concession made by the Crown we have no concern with that, and we have only to consider whether the Crown had a right to assert its immunity no matter how improbable it may be that the Crown would ever have done so. In my judgment, if the custodian had been directed to assert Crown immunity in this case, and had done so, he would not have had to pay the income tax in question, and that being so I have no alternative but to hold that the appeal should be allowed.

LORD TUCKER. My Lords, this case comes before your Lordships in peculiar and highly artificial circumstances as a result of certain concessions made at the trial by the Solicitor-General representing the Administrator of Hungarian Property, as a result of which it is common ground that the only issue is whether Crown immunity from the operation of the Income Tax Acts could have been successfully claimed by the Custodian of Enemy Property in respect of certain discounts received by him in the year 1942 from the investment of moneys held by him representing the proceeds of sale of certain gold bars which at the outbreak of war had belonged to the plaintiff bank, and which had become vested in the Custodian of Enemy Property pursuant to the Trading with the Enemy legislation. It is also agreed that unless Crown immunity could have been established the discounts in question would have been taxable on receipt thereof by the custodian.

The plaintiff bank is a limited company incorporated in

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Holland. Prior to the last war it had deposited certain gold bars in the City of London. In May, 1940, Holland was invaded and on the 20th of that month became enemy territory for the purposes of the Trading with the Enemy legislation. On July 3, 1940, the Board of Trade, under the Trading with the Enemy Act, 1939, s. 7, made a vesting order transferring this gold to the Custodian of Enemy Property who had been appointed by the Board under powers conferred upon it by the said section. On July 22 a further order gave the custodian power to sell this gold. On July 24 he sold the gold for the sum of £1,984,120 15s. 5d. and retained the proceeds as enemy property. After the conclusion of hostilities, viz., on April 6, 1950, the Administrator of Hungarian Property, appointed by the Board of Trade under powers conferred by the Treaty of Peace (Hungary) Order, 1948, required the custodian under article 1 (5) (e) of that Order to transfer to him the proceeds of sale of the gold bars. This step was taken under the erroneous belief that the proceeds of sale were property rights and interest of an Hungarian national and consequently subject to the charge imposed by the Treaty of Peace (Hungary) Order, 1948. The plaintiff bank, who had previously demanded the return of these moneys from the custodian before the transfer to the administrator, which demand had been refused, accordingly brought an action against the custodian and the administrator to recover the money. This action was heard by Devlin J. It failed as against the custodian, but succeeded against the administrator.

In the course of the case, and before the amount for which judgment should finally be entered had been agreed or otherwise ascertained, it was conceded by the Solicitor-General, representing the defendants, that for the purpose of this case any interest or other money which this sale had earned while in the hands of the custodian—referred to as “the fruits”—should be treated as part of the proceeds in the hands of the administrator.

A question thereafter arose as to whether from these “fruits” there should be deducted the sum of £72,549 9s. 11d., being income tax paid by the custodian in respect of discounts resulting from the investment of this money in the purchase of Treasury bills. The matter came again before Devlin J., who decided that the plaintiff bank was entitled to recover “the fruits” in full without deduction of tax on the ground that Crown immunity attached to the custodian in respect of his receipt of this income.

This decision was reversed on appeal by the Court of Appeal. There was no appeal by either side from the judge’s judgment

with regard to the principal moneys. The relevant legislative enactments have been fully set out by my noble and learned friend, Lord Morton of Henryton, and I need not repeat them.

The question for decision is, accordingly, whether the custodian, in receiving this income under these statutory provisions, falls within any one of the classes of persons in respect of whom the principle of Crown immunity applies. There are three such classes: 1. The Sovereign personally. 2. His servants or agents. 3. Persons who are not Crown servants or agents but who, for certain limited purposes, are considered to be "in consimili casu."

The first class needs no consideration for present purposes. It is not always easy to ascertain from the decided cases whether a particular decision has been based upon considerations applicable to class 2 or class 3, but I think that the following propositions emerge from the speeches in this House in the cases of *Mersey Docks and Harbour Board v. Cameron*⁵² and *Coomber v. Berks Justices*,⁵³ and the judgments of the Court of Appeal in the more recent cases of *Administrator of Austrian Property v. Russian Bank for Foreign Trade*⁵⁴ and *Territorial and Auxiliary Forces Association of the County of London v. Nichols*⁵⁵:—

1. The immunity extends at least to include all those officers of State and their subordinates who now perform, pursuant to statutory authority, functions of public government which were formerly the peculiar prerogatives of the Crown.

2. Such functions include the making and carrying on of war and the making of treaties of peace and other consequential international arrangements and the performance thereof.

3. It is immaterial whether the person in respect of whom the immunity is claimed is himself an officer of State with ministerial status or is a subordinate official of such Minister or is himself an executive officer of lower status than that of a Minister.

4. The immunity extends to such persons only so long as they are acting in the capacity described above.

5. This immunity also extends to persons who do not come within the class above described but are the owners or occupiers of property exclusively used for the purposes of government. The immunity only protects such persons in respect of liability or disability arising in respect of the ownership or occupation of

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⁵² 11 H.L.C. 443.

⁵³ 9 App.Cas. 61

⁵⁴ 48 T.L.R. 47.

⁵⁵ [1949] 1 K.B. 35; 64 T.L.R. 438; [1948] 2 All E.R. 432.

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My Lords, if these propositions are properly deducible from the principles enunciated in the authorities referred to above, and if the two cases in the Court of Appeal were correctly decided, as I think they were, I have little doubt that the Custodian of Enemy Property in receiving the income in question came within class 2 and is covered by paragraphs numbered 1 to 4 inclusive above. My reasons for so holding are as follows:—

The functions of the custodian in receiving and preserving and ultimately disposing of enemy property under the directions of the Board of Trade or Treasury were a necessary part of the machinery of modern government directed to the making and prosecution of the war and the making and implementing of treaties of peace and agreements with other States on the termination of hostilities, which functions were formerly the prerogative of the Crown.

The custodian in all essentials was a subordinate of the Board of Trade subject only to the directions of the Treasury under paragraph 4 (3) of the Defence (Trading with the Enemy) Regulations. His discretionary powers were negligible, and with regard to the actual receipt and disposal of moneys were non-existent save as in so far as expressly conferred upon him in any particular case by the Board. He was in no sense an agent or trustee for the former alien owner whose beneficial interest in the gold bars had been extinguished by the Trading with the Enemy legislation and who had only a "spes restitutionis": cf. *In re Munster*.⁵⁶ Only the Board of Trade or the Treasury could give directions as to the disposal of these bars or their proceeds and the custodian was bound to comply with their orders.

I have already made passing reference to the case of *Administrator of Austrian Property v. Russian Bank for Foreign Trade*⁵⁷ as one of the authorities from which the governing principles can be extracted, and, in my opinion—with deference to the contrary view expressed by the Court of Appeal—it is indistinguishable from the present case. The Austrian administrator and the custodian in the present case were both appointed pursuant to statutory authority, in the former case for the purpose of collecting and disposing of enemy moneys at the conclusion of war, in the present case for the purpose of collecting and preserving such moneys during a war. Both the administrator and the custodian

⁵⁶ [1920] 1 Ch. 268.

⁵⁷ 48 T.L.R. 37.

were cogs in governmental machinery devised in modern conditions for performing the former prerogative functions of the Sovereign. It is true that Scrutton and Greer L.JJ. appear to have regarded the administrator as performing a Crown function directly derived from the prerogative, but, as Slessor L.J. pointed out in his judgment, the administrator was in fact acting under statutory authority in precisely the same way as the custodian in the present case, although in both cases the statutory functions represented those which formerly pertained to the prerogative.

This does not, however, dispose of the case. It is still necessary to decide whether this income was Crown income. A servant or agent of the Crown might be charged with the duty of receiving and applying income for the benefit of some person other than the Crown. That is not the position in this case. The beneficial interest was in suspense but the former owner's interest had been extinguished. It was not his interest which was in suspense. I am prepared for present purposes to assume (but not to decide) that an order made before the end of the war appropriating these moneys to the public revenue would have been *ultra vires*. This does not seem to me decisive. I agree, for the reasons which have been stated by my noble and learned friend, Lord Reid, that "arrangements to be made at the conclusion of peace" include arrangements which could be made without the authority of Parliament, and that this gave the Crown a sufficient interest in the fund to invoke the principle of immunity. The fact that at the moment of receipt the income could not be applied exclusively to the public revenue is, as it seems to me, a consideration which would only become relevant if (as to which I have considerable doubt) the decisions in the "in consimili casu" cases, based as they are on the ownership or occupation of real property, can be extended to cover such a case as the present.

My Lords, for these reasons I would allow the appeal. Devlin J. in his judgment put the custodian in the "in consimili casu" class, but much of his reasoning seems to me to point rather to the conclusion that the custodian should truly be considered as the servant or agent of the Crown. In the result, however, I agree with his judgment.

LORD ASQUITH OF BISHOPSTONE. My Lords, I agree with the conclusions reached by my noble and learned friends, Lord Reid and Lord Tucker.

The only issue, having regard to the concessions and assumptions on which by agreement the case proceeded, is whether, in

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respect of the "fruits" of investment of the property in question, the Custodian of Enemy Property could successfully have resisted payment of income tax. He could, *ex concessis*, only have done this if he could have established that he shared the Crown's immunity from income tax.

Unfortunately, the leading decisions of your Lordships' House on "Crown immunity" concern immunity mainly in respect of land or buildings; they concern exemption from liability to rates, or Schedule A of the income tax, and any principles deduced from these decisions can only be applied by an analogical extension to cases such as the present, where what is involved is not the user of premises but the possession or handling of chattels or funds.

The principles applied to the occupation of land and buildings (which must form the starting point) seem to include the following:—

1. The Sovereign is personally immune not only from rates and Schedule A but from all direct taxation. This is clear, but irrelevant to the present case.

2. "Servants of the Crown" are immune from rates and Schedule A on premises occupied by them as such. This is the result of two other rules—(a) a servant does not "occupy"; his master "occupies" through him—hence the servant is immune; (b) the master being in this case the Sovereign, and immune as such, no one is liable. The suggestion that this immunity is limited to cases where the servant is the holder of, or the modern successor to, a small group of ancient offices has been sometimes ventilated, but would appear to have no foundation in principle, or in any authority binding on this House. On this point I strongly agree with what has fallen from my noble and learned friend, Lord Reid, who has explored this point in some detail.

3. Persons may enjoy immunity who are not servants of the Crown but occupy premises, such as assize courts, judges' lodgings, policemen's lodgings, and the like, and do so exclusively for the performance of the functions of the executive government. These persons are in some of the cases described as "in consimili casu" with servants of the Crown. Persons will tend to be placed in this category if the public functions which they discharge are closely connected with the exercise of the Royal prerogative; e.g., *inter alia*, the administration of justice, the preservation of public order, the making of war and the conclusion of peace. And the courts appear on some of the authorities to have taken these last factors into account as relevant in deciding who is a "servant of the Crown" within the second class.

These principles seem to be most clearly stated in the opinion of Lord Cranworth in *Mersey Docks and Harbour Board Trustees v. Cameron*,⁵⁸ though they emerge also in *Greig v. Edinburgh University*,⁵⁹ *Coomber v. Berkshire Justices*⁶⁰ and *Metropolitan Meat Industry Board v. Sheedy*.⁶¹

For completeness perhaps a fourth principle or rule may be added.

4. The courts will lean against including in any of the exempted categories an aggregation of commercial undertakings brought under some degree of public statutory control, and they will (if the other requirements are satisfied) lean in favour of exemption for persons or bodies who are mere ministerial instruments of the Crown's will, lacking in themselves any discretion or initiative.

To adapt these principles, moulded in large measure for a somewhat different purpose, to the facts of such a case as the present is not easy. But the attempt to do so points to the following features of the present case as relevant, and throws them into relief:—

1. The custodian is not a commercial corporation subject to public control.

2. He is a public officer appointed and removable by the Crown under statutory powers.

3. He enjoys in substance no discretion of his own. In practically every matter he must do what the Board of Trade (or, in some cases, the Treasury) direct him to do.

4. Subject to their control—the Crown's control—he collects, handles, invests and is intended ultimately to distribute in accordance with treaties to be made by the Crown, the property which comes to him (in which, needless to say, he has no personal interest). As counsel for the respondent put it, every act of his has "O.H.M.S." stamped on it.

5. The decision of Russell J. in *In re Munster*,⁶² though made under the Trading with the Enemy (Amendment) Act, 1914, seems to me in general an accurate description of the status and functions of the Custodian of Enemy Property and the character assumed by property vested in him under the corresponding Act of 1939. He is not the agent or trustee of the aliens, enemy or friendly, who were owners of the property before it came into his hands. When such property vests in him it ceases thereupon beneficially to belong to its original

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⁵⁸ 11 H.L.C. 443.

⁵⁹ L.R. 1 Sc. & D. 348.

⁶⁰ 9 App.Cas. 61.

⁶¹ [1927] A.C. 899.

⁶² [1920] 1 Ch. 268.

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owners; and though in pursuance of "arrangements to be made" at the conclusion of peace" (section 7 (1) of the 1939 Act), viz., in pursuance of treaties of peace to be negotiated by the Crown, the Crown could re-create a title in the original owners, it could, in my view, equally create such a title in anyone else, including itself. The "statutory suspension" of title referred to by Lord Russell of Killowen seems to me in its context to point not to the persistence throughout of a temporarily submerged title but to the extinction of that title, subject to the possibility of its rebirth. Lord Haldane's language in *Hugh Stevenson & Sons Ltd. v. Aktiengesellschaft für Cartonnagen-Industrie*,⁶³ which suggests the contrary, is dealing, in my view, not with the statutory but purely with the common law position.

6. The functions of the custodian are intimately linked with the prerogative powers of the Crown to declare and wage war and to make peace. He is a conduit pipe for the flow and canalization of these powers.

Taking account of these factors collectively, I am of opinion that the custodian is a "servant of the Crown" within the second exempted class, and immune from income tax as regards funds coming into his hands in his capacity as such. I do not think it is a prerequisite to this immunity that those funds must be "Crown income" in the sense of being payable solely, and immediately to the central fiscus, or that the immunity is defeated the moment it is shown that the Crown has power to divert them in part or in whole to some other destination. The Crown has in effect an unlimited power of disposition over his property. The case of *Administrator of Austrian Property v. Russian Bank for Foreign Trade*,⁶⁴ which in my view was rightly decided, seems to me fatal to the contrary view, and I agree with my noble and learned friend, Lord Tucker, that the attempt to distinguish that case from the present case fails.

I am of opinion that the appeal should be allowed.

LORD KEITH OF AVONHOLM. My Lords, the question whether the Custodian of Enemy Property was immune from payment of income tax on the fruits of the property in his hands, or at least on that part of the fruits ascribable to the capital sum recovered by the appellant bank, is not, in my opinion, susceptible of easy solution.

At the outset there arises a question as to the status of the

⁶³ [1918] A.C. 239, 247; 34 T.L.R. 206.

⁶⁴ 48 T.L.R. 37.

custodian. Is he a servant of the Crown? If so, in what sense? He was appointed by the Board of Trade under the Trading with the Enemy Act, 1939. Section 7 of the Act in its opening words explains, in my opinion, the primary purpose of his appointment: "With a view to preventing the payment of money to enemies" and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace." I should add here that by the definition of "enemy" in the Act these words cover property in this country of friendly aliens and British subjects resident in enemy, or enemy-occupied, territory.

It was strongly contended for the appellant that the custodian was a servant of the Crown in the fullest sense of the term, in that he was at every point, except possibly in the matter of investment of moneys, subject to the directions and control of the Board of Trade. He was thus just the hand of the Board of Trade and entitled to all the immunities of the President of the Board, one of the traditional officers of State. I am far from satisfied, however, that the custodian was so completely deprived of an independent discretion in all the duties of his office as is suggested. I do not wish to go through all the provisions of the statute and relative orders. I refer shortly to some of the provisions that seem relevant. Section 7 (1) (f) authorizes an order of the Board of Trade to require any person to furnish such returns, accounts and other information and to produce such documents "as the custodian considers necessary for the discharge of his functions under the order." This seems to me to be an order controlling or directing not the custodian but other people and entrusting the custodian with a complete discretion to enforce the order. By section 7 (2) of the Act the custodian may grant a certificate that any money or property falls under an order of the Board of Trade which shall be evidence of the facts stated therein and exempts any person complying with a requirement or direction of the custodian from liability to any action or other legal proceeding. Section 3 (c) provides that where a direction is given to any person by the custodian in relation to any property "which appears to the custodian" to be property to which an order applies, the direction shall not be invalidated or affected by reason only that at a material time a person interested in the property and who was an enemy or enemy subject had died or had ceased to be an enemy subject, or a person so interested and "who was believed by the custodian to be an enemy or an enemy subject," was not an enemy or an enemy subject. These provisions appear to me to give the custodian considerable independent

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discretion in material and important particulars and, indeed, to be directed towards enabling the custodian as an independent official to prevent the payment of moneys to enemies and to preserve enemy property in contemplation of arrangements to be made at the conclusion of peace. No doubt the Board of Trade and, to a lesser extent, the Treasury are given powers to prescribe the rights, powers, duties and liabilities of the custodian in certain matters and to give directions. Such powers were clearly necessary in the manifold circumstances that might arise with reference to enemy property during the war. Such, for instance, are the powers taken to themselves by the Board to direct the custodian in certain matters under paragraph 3 of the Trading with the Enemy (Custodian) Order, 1939, and given to the Treasury (but never, we were given to understand, exercised) by regulation 4 (3) of the Defence (Trading with the Enemy) Regulations, 1940, as amended. But the provisions of the Board of Trade Orders were not all of this character. A number were plainly intended to arm the custodian with powers to carry out the independent functions given him by the statute. For example, under paragraph 1 (vii) and (viii) of the Trading with the Enemy (Custodian) Order, 1939, the custodian has power to sue for and recover any moneys payable to him under the Order in his own name. Again, paragraph 5 of the same Order directs persons who hold or manage for or on behalf of an enemy or an enemy subject any property to furnish to the custodian such returns, accounts and other information and produce for inspection such documents "as the custodian may require." Generally it may be said that the Board of Trade was the order-making authority. But within the scope of these Orders and for the purpose of carrying out the purposes of the statute, supplemented by these Orders, it seems clear that the custodian had considerable independent statutory power and authority.

We were referred to three decisions of this House which were thought to throw light on the question of who was a servant of the Crown. I do not find these decisions very helpful on this point. The matter for decision was not who was a servant of the Crown but what property was exempt from rateability, or taxation under Schedule A, in respect of the uses to which it was put. The decisions were that the exemption extended only to property that was occupied for what I shall call for the moment Crown purposes. In that connexion was instanced property occupied by the Sovereign or by her servants for her. Various passages from

these cases have been quoted by two of your Lordships, and I refrain from adding to their number.

I am satisfied from the speeches in those cases that this House was considering the kind of occupation which permitted an appeal to the principle of Crown exemption from tax and that any reference to servants of the Crown was to emphasize the nature of the occupation. There is a reference to occupation by the Sovereign in person which plainly establishes the exemption. There are references to occupation "by her servants for Her Majesty," by "the direct and immediate servants of the Crown" whose occupation is the occupation of the Crown itself," by "the immediate and actual servants of the Crown." Such persons would include, of course, menial servants of the Crown who were occupying for the Crown. There are further references to "servants of the great departments of State," "in all which cases the occupiers might strictly be called the servants of the Crown." Lastly there are references to persons who are not servants of the Crown at all, "not strictly servants of the Crown," "bare trustees for public purposes," being purposes "required and created by the government of the country" and therefore "to be deemed part of the use and service of the Crown." These correspond to persons described by Blackburn J. in the *Mersey Docks* case⁶⁵ as in consimili casu with servants of the Crown.

In all this there is little that throws light on what constitutes a person a servant of the Crown. Obvious cases like a Minister of State, or the Sovereign's coachman, need hardly be considered. But it is to be observed that it is his functions or duties that stamp a person as a servant of the Crown, and that it is only in respect of services performed for the Crown and to prevent any detriment to or liability of the Crown in its person, property or rights that immunity can be claimed. The Minister performs the traditional functions of the Sovereign. It is not in his official but in his representative capacity that he claims Crown immunity. The coachman drives the Sovereign's coach. Unlike the Sovereign, the Minister or the coachman have not complete immunity. They have immunity only in their capacity of Crown servants.

While it is thus no doubt easy in some cases to establish the status of a person as a Crown servant by looking either at his office or at his functions, because each reflects the character of the other, there are marginal cases where it is impossible, in

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my opinion, to say whether a person is a servant of the Crown without considering what he does. The Custodian of Enemy Property is, I think, such a case. In the first place, there is no contract with, or employment by, the Board of Trade. He is an official appointed by the Board of Trade. It is not clear from Regulation 4 (2) of the Defence (Trading with the Enemy) Regulations, 1940, that his appointment could be recalled by the Board, though in the event of death or retirement a new appointment could, of course, be made. He is not appointed under an order of the Board, and accordingly the power in section 15 (5) of the Act to vary or revoke an order does not apply. He has further, as I indicated at the outset of my opinion, a considerable measure of independence and discretion under the statute uncontrolled by the Board of Trade. All I can find to say of him, looking solely at his status, is that he is a statutory official.

Agreeing, then, with the Court of Appeal, I think his immunity from tax can be decided only by examining the purposes for which he received the income and his duties in regard to it when it came into his hands. To establish immunity from tax it is necessary to show, as decided in this House in the case of occupation of land or buildings, that he received and held the income for the Crown, or for the purposes of the government of the country, so as to be deemed part of the use and service of the Crown.

The dominant purposes of the appointment of the custodian are, in my opinion, set out in the opening words of section 7 of the statute. I have already quoted these words. The purposes are twofold; (1) preventing the payment of moneys to enemies; and (2) preserving enemy property in contemplation of arrangements to be made at the conclusion of peace. Both these may properly be said to be temporary purposes. When war ends enemies will cease to be enemies and fresh dispositions of the property will fall to be made. The custodian is primarily a holder of funds, with incidental powers of administration and investment, and, to a limited extent, of distribution when directed by the Treasury under Regulation 4 (3) of the Defence (Trading with the Enemy) Regulations, 1940, as amended, or by the Board of Trade under paragraph 3 (ii) of the Trading with the Enemy (Custodian) Order, 1939. It is not unimportant to observe that a certain control over the custodian by the Board of Trade during war may not carry with it the implications that might arise in the case of control over a public official in times of peace. Every citizen during the war was subject to drastic

Government controls. The order authorizing the custodian to sell the gold vested in him had its counterpart in the regulations affecting all persons holding gold and foreign securities during the war.

It is not suggested that when property was vested in the custodian it became the property of the Crown, or that the income was income of the Crown. The contention is that the property constituted a fund held for Crown purposes and subject to the complete control of the Board of Trade or the Treasury. These purposes were withholding comfort from the enemy and distribution either during or at the end of the war. It may be conceded that withholding money from the enemy is a Crown purpose, but this is something quite different from saying that it is being held for the Crown, or to be used or expended in the functions of Government. To pay income tax on the income of the fund could in no way prejudice this purpose and, indeed, would be to the benefit of the Crown. I agree that if this were a special fund, held for the use and service of the Crown, to pay tax on its income would be to the prejudice of the Crown, notwithstanding that the tax, if collected, would find its way into the fiscus. But that is not the case here. It would be a somewhat remarkable result that an immunity could be claimed which was of no benefit to the Crown and was indeed to its detriment.

It would further be necessary to say that the preservation of enemy property in contemplation of arrangements to be made at the conclusion of the peace was a purpose for the use and benefit of the Crown. The argument was that the Crown had the sole power of disposition of the property. I will assume that this is so inasmuch as the title is in the custodian, but unless it can be said that the Crown is quite unfettered in its power of disposal, so that it could divert the property to its own uses, or at its will away from the original owners, that would not, in my opinion, avail the appellants. Such powers could only come from the exercise of the royal prerogative, by order or direction of the Board of Trade or Treasury under the Act of 1939, or by some separate statutory enactment.

The extent of the prerogative to seize the property of persons in this country was considered very fully by this House in *Attorney-General v. De Keyser's Royal Hotel Ltd.*⁶⁶ From the speeches of all their Lordships it appears that in ancient times the Crown could take and use temporarily in time of war and

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⁶⁶ [1920] A.C. 508; 36 T.L.R. 600.

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for the defence of the realm the property of its subjects without compensation, when necessity arose. But such a power had not been exercised since the time of the Stuarts and had been superseded so far as the taking of land was concerned by statutory powers allowing the property to be taken on payment of compensation. Such a power, under the prerogative, had been exercised only in time of danger, was a power of user, and was of temporary effect. There is no suggestion that it carried with it any power of confiscation. The use was only such as was required by the exigencies of the occasion.

From that decision it appears clear that there was never a prerogative to confiscate the property of a subject in time of war, that, when the exigency of war had passed, the property would return to the owner, and that if the disposition of property during war was dealt with by the legislature that superseded any necessity of invoking the prerogative. The prerogative is reserved by section 16 of the Act of 1939, but that can only be quantum valeat, and if the prerogative never covered power to confiscate property of a subject during war for war purposes the reservation can be disregarded. It was not, as I understood, relied on by the appellants. Further, if the royal prerogative in the days of its full vigour did not extend to confiscation of a subject's property in time of war, I am not prepared to assume that the legislature intended to confer a statutory power to confiscate a subject's property in 1939. Such a power would require to be very clearly shown by the language of the statute and never to be presumed.

Lastly, as the whole purpose of seizing enemy property during the war was to remove it from enemy use or control, that object was achieved by the legislature's vesting it in the custodian. No other purpose would seem to be necessary that would call for the exercise of the prerogative. I conclude, accordingly, that enemy property so far as it belonged to British subjects could not be deflected to Crown uses and had, when the war was over, to go back to its owners e'ther in its original form or in the form it took as the result of transactions with it in the course of its administration in the custodian's hands. The same can be said, I think, with equal force, and some may think a fortiori, about the property of friendly aliens. This, indeed, was clearly the view of the executive in transmitting proposals to the Royal Netherlands Government which led to the Anglo-Dutch property agreement of October, 1944.

In the case of the property of enemy subjects different considerations arise. There are a number of judgments of this House

in which this question has arisen as well as cases in the courts below. These may come up for consideration on another occasion. As the Act of 1939 does not discriminate between different categories of enemy property it may be difficult to support the exercise of special powers under the Act with regard to the property of enemy subjects which could not be exercised with reference to the property of British subjects or friendly aliens. It is more likely that such powers would be sought outside the Act, and they obviously would arise under the provisions of peace treaty legislation. On these matters I reserve my opinion. We were referred to the case of *R. J. Reuter Co. Ltd. v. Mulhens*.⁶⁷ That also was a case relating to property of an enemy subject. There were various grounds on which the judges of the Court of Appeal based their decision. For the purposes of the present appeal I find it unnecessary to express any opinion as to the soundness of the decision, or, if sound, as to the ratio on which it should be supported.

I also find it unnecessary to consider whether the case of the *Administrator of Austrian Property v. Russian Bank for Foreign Trade*⁶⁸ was rightly decided or whether, if it were, the ratio of the decision would have exempted the administrator from income tax on income received by him. The official was a different kind of official, originating from a Peace Treaty confirmed by Act of Parliament and dealing with property which had been diverted from the owners to be used for carrying out one of the purposes of the Treaty. Different considerations, in my opinion, apply to such a case.

The effect of a vesting order on the rights of the owner of the property vested was considered in *In re Munster*.⁶⁹ I do not find it necessary to examine closely the conception of a statutory suspension of the beneficial interest in the property as expressed by Russell J. in that case, though I prefer the language of Lord Parmoor in *Hugh Stevenson and Sons Ltd. v. Aktiengesellschaft für Cartonnagen-Industrie*,⁷⁰ where he said: "Two Acts of emergency legislation have been passed, based on the principle that enemy property is not confiscated, although the right to enjoyment is suspended during the war." The point is, in my opinion, immaterial as it is agreed that the vesting order does not confiscate the property of the owner. There must thus be something left with him. Whether this be called a right of property

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⁶⁷ [1954] Ch. 50.⁶⁸ 48 T.L.R. 37.⁶⁹ [1920] 1 Ch. 268.⁷⁰ [1918] A.C. 239, 258-9.

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or a vestige of property it is more, in my opinion, than a mere spes successionis. If it be supposed that the fetter or impediment on the enjoyment of the property, or the suspension of the beneficial interest, flies off, the full right of property would revive. Something of that sort must, indeed, have happened here when the property passed from the custodian to the Administrator of Hungarian Property. This all goes to show how difficult it is to show that the custodian was holding the property in question or receiving the income of the property for Crown uses, or for the purposes of government. For the reasons I have given I think that he was not. Accordingly, I agree with my noble and learned friend, Lord Morton of Henryton, that in September, 1945, and indeed during the whole time the property was vested in the custodian, it was impossible to show that the income received was Crown income or was received for the purposes of the government of the country. Unless this can be shown the custodian was liable in tax. The Court of Appeal arrived, in my opinion, at a sound judgment. I would dismiss the appeal.

Appeal allowed.

Solicitors: *Hardman, Phillips & Mann; Solicitor to the Board of Trade.*

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 July 15.

EDWARD LIONEL SENANAYAKE . . . APPELLANT;
 AND
 HERATH MUDIYANSELAGE NAVARATNE
 AND ANOTHER RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Privy Council—Appeal—Jurisdiction—Election petition—Ceylon—Lack of jurisdiction of election judge—No right of appeal to Judicial Committee—Ceylon (Parliamentary Elections) Order-in-Council, 1946 (as amended by Parliamentary Elections (Amendment) Act, No. 19, 1948, s. 3), ss. 81, 82, 82A, 82B, 82C, 82D, 83. Parliament—Election. Ceylon.

By section 81 of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, the determination by an election judge of matters

* *Present: LORD SIMONDS L.C., LORD COHEN, and Mr. L. M. D. DE SILVA.*

[Reported by Miss ELAINE JONES, Barrister-at-Law.]

arising on an election petition was final. The Parliamentary Elections (Amendment) Act, No. 19 of 1948, repealed sections 81 and 82 of the Order-in-Council and substituted new sections which provided for an appeal to the Supreme Court on a question of law, the decision of that court to be final and conclusive.

On appeal from a decision of the Supreme Court, affirming a decision of the election judge, on the ground that he had acted without jurisdiction since he had acceded to an application to amend the petition made out of time:—

Held, that, having regard to the peculiar nature of the jurisdiction and the importance in the public interest of securing, at an early date, a final determination of the matters entrusted to the tribunal, the intention of the Order-in-Council, as amended by Act No. 19 of 1948, was clearly to create a tribunal without the ordinary incident of appeal to the Crown, and that, therefore, an appeal, even on the ground that the election judge acted without jurisdiction, could not be entertained.

Théberge v. Laundry (1876) 2 App.Cas. 102, *Strickland (Lord) v. Grima* [1930] A.C. 285; sub nom. *Parnis v. Aguis*, 46 T.L.R. 194, and *de Silva v. Attorney-General* (1949) 50 Ceylon N.L.R. 481 applied.

APPEAL (No. 17 of 1954) from a decision of the Supreme Court of Ceylon (December 18, 1953) affirming by a majority an order of the election judge (February 13, 1953).

The following facts are taken from the judgment of the Board.

The election judge (de Silva P.J.) found that the appellant's election to the House of Representatives, Ceylon, as member for the Kandy electoral district was void on the ground that he had committed two corrupt practices. The Supreme Court reversed his decision on one of them, but affirmed his determination that the election was void on the ground that the appellant in breach of paragraph (f) of section 58 of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, had knowingly made the declaration as to election expenses, required by section 70 of the Order-in-Council, falsely.

Before the Supreme Court the appellant argued that the determination of the election judge ought to be reversed on two grounds: (1) that there was not evidence to support the finding of the election judge; (2) that he had no jurisdiction to hear the petition since, although the petition had been presented in accordance with section 83 (1) of the Order-in-Council, the application for leave to amend the petition by alleging a false declaration as to election expenses had not been made within 21 days of the date on which the result of the election had been published in the Government Gazette in accordance with section 50.

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The Supreme Court (Nagalingam A.C.J. and Pulle P.J., Gratien S.P.J. dissenting) rejected both pleas, the second by a majority on the ground that the case fell within the proviso to section 83 (1), the original petition (which raised other charges of corrupt practices) having been presented within the specified period of 21 days and the amendment raising the charge now in question having been made within 28 days after the transmission to the returning officer of the allegedly false return of election expenses.

The appellant applied to the Judicial Committee for leave to appeal from this decision. The respondents did not appear on the hearing of the petition, but the appellant's counsel called the Board's attention to certain authorities which raised a doubt whether the appeal could be entertained having regard to the subject-matter, the validity of a Parliamentary election, with which it dealt. Leave was granted on February 10, 1954, but "without prejudice to the right of the Attorney-General of Ceylon or the respondents to argue the question as to the jurisdiction of the Lords of the Committee to entertain the appeal."

The case lodged on behalf of the respondents contained no reference to the question thus reserved, but the respondents shortly before the hearing gave notice of their intention to raise it, and it was argued before the Judicial Committee as a preliminary point.

Section 81 of the Order-in-Council in its original form was as follows:—

"At the conclusion of the trial of an election petition the election judge shall determine whether the member whose return or election is complained of, or any other and what person, was duly returned or elected, or whether the election was void, and shall certify such determination to the Governor. Upon such certificate being given, such determination shall be final; and the return shall be confirmed or altered, or the Governor shall within one month of such determination by notice in the Government Gazette order the holding of an election in the electoral district concerned, as the case may require, in accordance with such certificate."

By section 82 (1) of the Order-in-Council the election judge was also required to report in writing to the Governor whether any corrupt or illegal practice had or had not been committed by or with the knowledge of any candidate at the election or by his agent, and by section 82 (3) when an election judge reported

that a corrupt or illegal practice had been committed by any person, that person was to be submitted to the same incapacities as if at the date of the said report he had been convicted of that practice pursuant to section 58 of the Order-in-Council.

Sections 81 and 82 of the Order-in-Council were repealed by section 3 of the Parliamentary Elections (Amendment) Act (No. 19 of 1948) and new sections 81, 82, 82A, 82B, 82C and 82D were substituted therefor. They conferred a right of appeal to the Supreme Court on a person dissatisfied with the determination of an election judge on a question of law, but not otherwise. The appeal had to be presented before the expiry of a period of one month next succeeding the date of the determination against which the appeal was preferred. Section 82B (3) provided that the decision of the Supreme Court was to be final and conclusive.

A right of appeal from a determination of the election judge having been given, the provisions in the original section 81 directed to securing an early election to fill any vacancy created by the determination had to be modified, but the substituted sections 82C and 82D contained provisions securing that the Governor-General should direct the holding of a new election within one month after receiving notice of the final determination that an election was void.

1954. June 21. *S. Nadesan Q.C., Sirimevan Amerasinghe and P. B. Tampoe*, for the respondents, took a preliminary point as to the jurisdiction of the Board to entertain the appeal. The question whether the prerogative of the Crown attaches to cases such as the present, in which an election court has determined that an election was void, depends upon the construction of the Order-in-Council of 1946, particularly sections 78, 79, 80, 81, 82, 83 and 86, as amended by section 3 of the Parliamentary Elections (Amendment) Act, No. 19 of 1948. The Order-in-Council gave the election judge power to determine what person had been returned or elected, or whether the election was void, and entitled the Governor-General, in the latter event, to order the holding of a new election for the district concerned within one month of the determination. The enactment of 1948, inter alia, made provision for an appeal to the Supreme Court of Ceylon from a determination of the election judge and, by section 82B, the decision of the Supreme Court was to be final and conclusive. By section 82A measures were laid down to ensure the speedy disposal of such appeals. The duty of the Governor-General to act within one month of a final determination that an election

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was void was retained by section 82D. The intention of the legislature to provide for an expeditious determination of election matters in order that the period of uncertainty as to the outcome of an election should be reduced as far as possible is clear. It is submitted, therefore, that the legislature intended by those provisions to exclude the prerogative of the Crown.

Reliance is placed on three decisions of the Judicial Committee, *Théberge v. Laudry*,¹ *Strickland (Lord) v. Grima*² and *de Silva v. Attorney-General*,³ the last of which was a decision under the original section 81 of the Ceylon (Parliamentary Election) Order-in-Council, 1946, the ordinance at present under consideration. In all those cases the Board decided that on the construction of the provision governing the determination of questions as to the election of members to the legislative assemblies of the countries concerned no right of appeal to the Judicial Committee was intended. The jurisdiction to determine the validity of an election is a special one, and the reason for the finality of the court's decision lies in the desirability of enabling the constitution of the legislative assembly to be speedily known.

Sir Hartley Shawcross Q.C., Kenneth Diplock Q.C. and R. K. Handoo for the appellant. It is conceded that the Order-in-Council of 1946 was intended to create a final and conclusive jurisdiction, but it is submitted that this applies only where the election court is acting within its jurisdiction. The three cases cited for the respondents can be distinguished on the ground that in those cases it was alleged that the courts had been in error as to the law, whereas the appeal in the present case is based on a collateral point as to jurisdiction. With regard to the decision in *de Silva v. Attorney-General*,⁴ it is not suggested that the Parliamentary Elections (Amendment) Act, No. 19 of 1948, altered the law, but it is submitted that in every case where a tribunal exceeds its jurisdiction, whether it be a special jurisdiction or not, the Judicial Committee has a jurisdiction to control the decision analogous to that of the Queen's Bench Divisional Court over subordinate tribunals. Neither the election judge nor the Supreme Court in the present case had jurisdiction to deal with the election petition out of time, nor can any court have jurisdiction to deal with a bad petition. It has never been decided that want of jurisdiction in an election case cannot be a proper ground for an appeal to the Judicial Committee.

¹ (1876) 2 App.Cas. 102.

² [1930] A.C. 285; sub nom. *Parnis v. Aguis*, 46 T.L.R. 194.

³ (1949) 50 C.N.L.R. 481; [1949] W.N. 248.

⁴ *Ibid.*

Reliance is further placed on *Nawaz v. King-Emperor*,⁵ in which special leave to appeal was granted by the Board, and it was held that the Judicial Committee was entitled to entertain an appeal where the court below had acted without jurisdiction. That case concerned a criminal matter, but an analogy may be drawn with the present case, for assuming there was a corrupt practice it was capable of giving rise to a prosecution. The judgment of Lord Coleridge C.J. in *Maude v. Lowley*⁶ is also relied on as showing that the acceptance of an improper election petition by a court goes to the question of jurisdiction.

Excess of jurisdiction always lays a matter open to consideration by the Board, and the present case, unless it constitutes one of a very special class, falls within this rule. A statute may adopt two different modes of conferring power on a tribunal; it may authorize the tribunal to decide whether it has jurisdiction, or the question of jurisdiction may be regarded as a collateral matter which the tribunal itself has no power to decide: *Reg. v. Income Tax Special Purposes Commissioners*.⁷ The present case falls within the second category. The judgment of Atkin L.J. in *Rex v. Justices of Lincolnshire, Ex parte Brett*⁸ is authority for the proposition that a court may lack jurisdiction because of a failure to comply with the requisite proceedings, such as service of notice, or by a wrong decision upon the existence of some collateral fact upon which the jurisdiction depends. In such circumstances an inferior court cannot, by a wrong decision, give itself jurisdiction. The present case is analogous to those in which notice is required and has not been given, and the court was, therefore, without jurisdiction. The Judicial Committee has a jurisdiction to interfere with a usurpation of jurisdiction by another court: *In re the Lord Bishop of Natal*.⁹

If election petitions do constitute a special type of case the Board may refuse to exercise its jurisdiction on either of two grounds, first, that election matters are historically within the special province of Parliament, or secondly, that there is some special provision in the legislation creating the election court. The respondents are, it is submitted, precluded from relying on the first point by the fact that the Judicial Committee, in the exercise of its discretion, granted special leave to appeal. The

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⁵ (1941) L.R. 68 I.A. 126.⁸ [1926] 2 K.B. 192.⁶ (1874) L.R. 9 C.P. 165.⁹ (1864) 3 Moo.P.C.N.S. 115.⁷ (1888) 21 Q.B.D. 313; 4 T.L.R.

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second point raises the question of the construction of the Order-in-Council as amended by Act No. 19 of 1948. It would be going far beyond what was decided in the three cases cited on behalf of the respondents to say that, where a special tribunal has manifestly acted outside its jurisdiction, the Board cannot interfere merely because the decision of the tribunal is not subject to appeal. The proposition may be tested by the extreme case of an election judge who has chosen to exercise his jurisdiction upon a piece of paper not purporting to be an election petition and on a matter which was not an election. It is beyond doubt that before the enactment of the amending statute the Judicial Committee would have quashed the decision of the election judge. The fact that, in the present case, the Supreme Court partly confirmed the order of the election judge, could not make the original order any the less a nullity for, on reading the whole of section 82 (a) (1), a condition has to be fulfilled before an appeal can be heard, namely, there must have been "the determination of an election judge." The present case is analogous to one in which, if the tribunal were an inferior tribunal, the prerogative writ of certiorari would run. The giving of a right of appeal cannot bar the right to a writ of certiorari; once that is admitted it follows that the determination of the election judge is not conclusive. If a court has acted without jurisdiction it is never too late to raise the point of lack of jurisdiction: *Asante v. Tawia*.¹⁰

The power of a tribunal to adjudicate upon its own jurisdiction is one which is liable to be abused and which should be held to exist only if the Ordinance constituting the tribunal clearly gives it such powers. To succeed on the present point the respondents must, therefore, show that the statutory provisions gave the election judge and the Supreme Court the power to decide whether particular matters were election matters and whether an election petition had been properly brought.

The observations of the Judicial Committee in the three cases cited against the appellant are relevant to the situation where the court below was actually considering an election matter and not where the question of want of jurisdiction has arisen. In *Valin v. Langlois*,¹¹ an election case in which the question of want of jurisdiction was raised, *Théberge v. Laudry*¹² was not mentioned. The Judicial Committee has frequently held that it is entitled to intervene where there has been a usurpation of

¹⁰ A.I.R. (1949) P.C. 171.¹² 2 App.Cas. 102.¹¹ (1879) 5 App.Cas. 115.

jurisdiction by the court below: *In re the Lord Bishop of Natal*,¹³ *Smith v. Justices of Sierra Leone*,¹⁴ *Rainy v. Justices of Sierra Leone*¹⁵ and *McDermott v. Hon. Joseph Beaumont and the Hon. Robert Crosby Beete*,¹⁶ in which the two previously cited cases were considered and a distinction was drawn between matters in which the decision of a court of record is final and matters in which the court of record has gone outside its jurisdiction and its decision is, therefore, liable to be set aside.

Kenneth Diplock Q.C. followed.

June 21. LORD SIMONDS L.C. announced that their Lordships would humbly advise Her Majesty that the appeal must be dismissed on the preliminary point as to jurisdiction, and that their reasons would be delivered later.

July 15. The reasons of their Lordships for dismissing the appeal were delivered by LORD SIMONDS L.C., who stated the facts set out above and continued: In support of his preliminary point Mr. Nadesan, for the respondents, relied on three decisions of this Board, *Théberge v. Laudry*,¹ *Strickland (Lord) v. Grima*² and *de Silva v. Attorney-General*.³ In *Théberge v. Laudry*⁴ their Lordships were considering a petition for leave to appeal from a decision of the Superior Court of Quebec declaring the appellant's election to the House of Assembly void on the ground of corrupt practices. The jurisdiction of the Superior Court in election matters had been established by the Quebec Controverted Elections Act,⁵ which had transferred to the Superior Court a jurisdiction previously exercised by the Assembly itself and which contained a provision that the judgment of the Superior Court in such cases should not be susceptible of appeal. Refusing leave to appeal Lord Cairns, delivering the judgment of the Board, said⁶: "Their Lordships wish to state distinctly, that they do not desire to imply any doubt whatever as to the general principle, that the prerogative of the Crown cannot be taken away except by express words; and they would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shown to take away

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¹³ 3 Moo.P.C.N.S. 115.

¹⁴ (1841) 3 Moo.P.C. 361.

¹⁵ (1852) 8 Moo.P.C. 47.

¹⁶ (1868) L.R. 2 P.C. 341.

¹ (1876) 2 App.Cas. 102.

² [1930] A.C. 285; sub nom. *Parnis*

v. *Aguis*, 46 T.L.R. 194.

³ (1949) 50 C.N.L.R. 481; [1949]

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⁴ 2 App.Cas. 102.

⁵ 38 Vict. c. 8. Quebec Statutes.

⁶ 2 App.Cas. 102, 106.

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“that prerogative. But, in the opinion of their Lordships, a somewhat different question arises in the present case. These two Acts of Parliament, the Acts of 1872 and 1875, are Acts peculiar in their character. They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new, and up to that time unknown, jurisdiction, in a particular court of the colony for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that court, that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be distinctly and speedily known.”

In *Strickland (Lord) v. Grima*⁷ a similar issue arose as to the constitution of the Senate of Malta. Leave to appeal had been granted, but the question of their Lordships' jurisdiction was raised at the hearing of the appeal. Lord Blanesburgh, delivering the judgment of the Board, said⁸: “Although special leave to appeal had been granted by His Majesty in Council, it was recognized that it was not thereby intended that the Board, with all the facts before it, should be precluded from reconsidering whether the appeal was competent.” The statutory provisions as to the composition of the Senate were complicated, and it is sufficient for present purposes to say that Letters Patent governing the matter contained a provision in these terms: “All questions which may arise as to the right of any person to be or remain a member of the Senate or the Legislative Assembly shall be referred to and decided by our Court of Appeal in Malta.” Their Lordships, applying *Théberge v. Laudry*,⁹ held that upon the construction of the Letters Patent an appeal would not lie and accordingly refused further to entertain the appeal.

In *de Silva v. Attorney-General*¹⁰ their Lordships were considering an application for leave to appeal from a determination of the election judge under the original section 81 of the Order-in-Council now before their Lordships. The determination had been given before the passing of Act No. 19 of 1948 and there was

⁷ [1930] A.C. 285.⁸ Ibid. 288.⁹ 2 App.Cas. 102.¹⁰ 50 C.N.L.R. 481.

therefore no right of appeal to the Supreme Court. Their Lordships advised His Majesty to refuse leave to appeal. Delivering the judgment of the Board, Lord Simonds, after referring to *Théberge v. Laudry*,¹¹ continued¹²: "It is no doubt true, as counsel for the petitioner urged, that the prerogative right to entertain an appeal is 'taken away only by express words or the necessary intendment of a statute or other equivalent act of State' (see *Renouf v. Attorney-General for Jersey*¹³) but as was pointed out in *Théberge v. Laudry*,¹⁴ the preliminary question must be asked whether it was ever the intention of creating a tribunal with the ordinary incident of an appeal to the Crown. In this case, as in that, it appears to their Lordships that the peculiar nature of the jurisdiction demands that this question should be answered in the negative. It was contended for the petitioner that different considerations apply where, as here, the jurisdiction of the election judge to hear election petitions is not substituted for that of the legislative body itself but is created de novo upon the establishment of that body. But this appears to their Lordships to be an unsubstantial distinction and in effect to be met by the later case of *Strickland (Lord) v. Grima*.¹⁵ Such a dispute as is here involved concerns the rights and privileges of a legislative assembly, and, whether that assembly assumes to decide such a dispute itself or it is submitted to the determination of a tribunal established for that purpose, the subject-matter is such that the determination must be final, demanding immediate action by the proper executive authority and admitting no appeal to His Majesty in Council. This is the substance of the authorities to which reference has been made, and it is noteworthy that in accordance with them an appeal in such a dispute has never yet been admitted."

Since *de Silva v. Attorney-General*¹⁶ was decided, the Ceylon Order-in-Council has been amended by allowing an appeal to the Supreme Court on questions of law, but their Lordships cannot regard that amendment as affecting the application to the present case of the principle laid down in the cases cited. In none of these cases was the jurisdiction of the tribunal to deal with the subject-matter at issue challenged, whereas, in the present case, Sir Hartley Shawcross, on behalf of the appellant, seeks to challenge the jurisdiction of the election judge on the second ground

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¹¹ 2 App.Cas. 102.¹⁴ 2 App.Cas. 102.¹² 50 C.N.L.R. 481, 483.¹⁵ [1930] A.C. 285.¹³ [1936] A.C. 445, 460; 52 T.L.R. 455; [1936] 1 All E.R. 936.¹⁶ 50 C.N.L.R. 481.

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raised by the appellant before the Supreme Court, namely, that the application for leave to amend the petition was not made within 21 days after the publication of the result of the election in the Government Gazette. The jurisdiction of the election judge being challenged the Judicial Committee, so the argument ran, must have jurisdiction to determine whether his order was a nullity.

In support of this argument he relied on the observations of Viscount Simon L.C. in *Nawaz v. King-Emperor*¹⁷ where, dealing with the question of the class of criminal cases in which the Judicial Committee will give leave to appeal, he said¹⁸: "Another " and obvious example would arise if the courts had no jurisdiction " either to try the crime, or to pass the sentence." But in that case their Lordships were considering not whether an appeal to the Judicial Committee was competent, but whether, in a class of cases in which admittedly an appeal was competent, their Lordships should in their discretion grant leave to appeal. Here, as was pointed out in *de Silva v. Attorney-General*,¹⁹ their Lordships are dealing with " the preliminary question . . . whether it " was ever the intention of creating a tribunal with the ordinary " incident of an appeal to the Crown."

Sir Hartley Shawcross mainly relied, however, on some observations of Lord Esher in *Reg. v. Income Tax Special Purposes Commissioners*,²⁰ where Lord Esher was dealing with the powers which an Act of Parliament may confer on an inferior court or tribunal or body when first creating it. He said²¹: " It may in " effect say that, if a certain state of facts exists and is shewn to " such tribunal or body before it proceeds to do certain things, it " shall have jurisdiction to do such things, but not otherwise. " There it is not for them conclusively to decide whether that state " of facts exists, and, if they exercise the jurisdiction without its " existence, what they do may be questioned, and it will be held " that they have acted without jurisdiction. But there is another " state of things which may exist. The legislature may intrust the " tribunal or body with a jurisdiction, which includes the jurisdic- " tion to determine whether the preliminary state of facts exists " as well as the jurisdiction, on finding that it does exist, to pro- " ceed further or do something more. When the legislature are " establishing such a tribunal or body with limited jurisdiction, " they also have to consider, whatever jurisdiction they give them,

¹⁷ (1941) L.R. 68 I.A. 126.¹⁸ Ibid. 128.¹⁹ 50 C.N.L.R. 481, 483.²⁰ (1888) 21 Q.B.D. 313; 4 T.L.R.

636.

²¹ 21 Q.B.D. 313, 319.

“ whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction.”

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Sir Hartley said that the courts, in determining into which class a particular tribunal falls, should lean against the second alternative since it might leave the subject at the mercy of an arbitrary tribunal without any right of appeal. Such, he said, would have been the position in Ceylon before the amending Act No. 19 of 1948. Their Lordships must point out that Lord Esher was dealing with a case where the statute had made the existence of a special set of facts a condition precedent to the exercise of jurisdiction by a tribunal, whereas their Lordships have to deal with a case where the question of jurisdiction depends on the construction of the statute itself. Their Lordships are therefore unable to derive much assistance from the case last cited. They are satisfied that the election judge, as established by the Order-in-Council of 1946, was a tribunal with a jurisdiction, not only to determine finally the question whether the corrupt practices alleged in the petition had been committed, but also to determine finally whether, upon the true construction of the Order-in-Council, it was competent in the circumstances for the petitioner to maintain his amended petition. Their Lordships do not desire to repeat what was said by their predecessors in the cases cited. Suffice it to say that, in their Lordships' opinion, the peculiar nature of the jurisdiction and the importance in the public interest of securing at an early date a final determination of the matter and the representation in Parliament of the constituency affected, make it clear that it was not the intention of the Order-in-Council to create a tribunal with the ordinary incident of an appeal to the Crown. It is for these reasons that their Lordships have humbly tendered their advice to Her Majesty that the appeal ought not to be further entertained.

Appeal dismissed.

Solicitors: *de Silva & Mendis; Smiles & Co.*

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